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Hybrid Press: Newspapering on the Coeur d'Alene Mining Frontier, 1890-1892

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Hybrid Press: Newspapering on the Coeur d'Alene Mining Frontier, 1890-1892

The 1890 Frontier

At first glance, the words "frontier" and "wagework" seem mutually exclusive. Urbanization, industrial development, and a labor pool supposedly evidenced that a region's frontier phase had passed.[1] This perspective results in few historical studies of western labor as a distinct social phenomenon. Yet, as Schwantes points out, the classic pioneer West and the early industrial West frequently overlapped, "and one such conjunction was the wageworkers' frontier."[2] At its height in 1890, this frontier was a "predominately male community of manual labor dependent upon others for wages in the extractive industries of the sparsely settled Rocky Mountain and Pacific regions."[3] Schwantes' concept of a wageworkers' frontier thus provides "an alternative to the prevailing tendency to fragment historical treatment of western labor."[4] He provides a framework for exploring an era in transition.

In discussing the psychological, social, and physical attributes that characterize an industrial frontier, Schwantes identifies three primary categories of wage earners: coal and metal miners, loggers and sawyers, and harvest hands. Each type of worker faced a similar experience. For example, in chasing the American myth that hard work and a little luck would result in wealth and independence, a typical mining pioneer came west an

individual fortune hunter "and ended up as an employee of one of the new, heavily capitalized mining companies."[5]

North Idaho's Coeur d'Alene mining district exemplifies the wageworkers' frontier.[6] No settled community existed in this 50-square-mile area of rich ore deposits until gold was discovered in 1883 along Prichard Creek of the Coeur d'Alene River's North Fork. The ensuing stampede then established, and swelled, the mining camp of Murray with thousands of prospectors by March of 1884.[7] By 1886 practically every silver-lead ore mine of importance in Coeur d'Alene history had been discovered and legally claimed. In fact, there were forty developed mines employing several thousand miners by 1891.[8] With the mines came settlements. Camps like Burke, Gem, Wardner, Milo (Kellogg), Mullan, and Wallace grew up nearly on top of these claims.

The press also arrived early. Just downstream from Murray in Eagle City, the region's first newspaper was printed in March 1884, the Coeur d'Alene Weekly Nugget.[9] Two months later the Belknap Sun appeared.[10] By 1893, nine newspapers circulated through the Coeur d'Alenes. But what kind of newspaper served an industrial frontier like the Coeur d'Alene mining district? How did the unique socio-economic setting shape the news product? My purpose is to describe journalism in one industrial mining region to contribute to a definition of the press on the wageworkers' frontier.

The Wallace Press

Adam Aulbach came to the Coeur d'Alenes in 1884. Just 39 years old, he already had 27 years experience as a printer/journalist with time out for two gold rushes and Civil War service.[11] Stopping in Belknap, Montana, Aulbach decided the Coeur d'Alenes were ripe for a good newspaper and, on May 13, 1884, the Belknap Sun was born. The Sun focused on district mining activities and within a few months Aulbach realized he needed better access to events. That meant crossing the Bitter Root Mountains and relocating in Murray, Idaho, at the time a major undertaking.

The Mullan Road was completed in 1860, joining the headwaters of the Missouri River with those of the Columbia. Following the St. Regis and Coeur d'Alene valleys, its basic route still connects Missoula, Montana with Spokane, Washington. But in 1884, the road had nearly reverted to its natural state.[12] Besides this, Murray was not even close to the Mullan Road. After Aulbach crossed the Bitter Roots into Idaho, the Coeur d'Alene Mountains still stood between him and Murray. Yet, at great expense, with his complete printing outfit roped onto 45 mules, Aulbach crossed the uncut and still snow-drifted mountain trails and reached Murray on July 1, 1884. The first issue of his Idaho Sun appeared one week later.[13]

Within two years the Sun was a daily. But by 1888 gold was running out on the Coeur d'Alene River's North Fork and with

it the Sun's fortune. Mining emphasis was shifting from prospecting to producing and the rich galena ore discoveries of the South Fork country succeeded to prosperity. Aulbach saw this shift in fortune, closed the Sun, and in 1890 purchased the struggling Wallace Press from Edward and Frank Tibbals.[14] He chose Wallace (founded in 1884) because its central location made it the hub of regional mining activity.

What type of journalism was practiced on this wageworkers' frontier? What was a newspaper's community role? What news did the Wallace Press emphasize and why? What was its political role? As editor/publisher, does Aulbach provide evidence of political partisanship? If so, biased toward which political ideology and was it a subsidized partisanship? Finally, what is the amount and substance of advertising content, which is not only a source of revenue but an indicator of community support.

Method

To answer these questions, I conducted a content analysis of the Wallace Press based on Holsti's definition: "any technique for making inferences by objectively and systematically identifying specified characteristics of messages."[15] Remnants of the newspaper show Aulbach was publisher as early as September 1890. This daily version of the Press had four pages carrying five 13-inch columns per page, hand-printed Tuesday through Saturday. But in November, Aulbach turned the Press into a larger

four-page weekly that carried six 15-inch columns and is the focus of this analysis. Aulbach hand-printed his weekly every Saturday, November 8, 1890 through July 16, 1892, 90 editions in all. The sample includes every second edition through October 27, 1891 then, due to time constraints, every fourth issue through July 9, 1892. Because of the extraordinary circumstances of the newspaper's demise, the final edition was also analyzed. This produced a sample of 38 newspapers comprising 42% of existing editions.

The paper followed a consistent layout: The front page, devoid of column advertising, provided relatively up-to-date information on local, regional, state and national events. Page two contained editorials and advertising. Page three was dominated by advertising with news-holes usually comprising a potpourri of soft news items (e.g., social, entertainment, sports, literary). The back page consisted primarily of advertising with regular columns on local happenings and civic transactions or business.

The recording unit for this content analysis was the individual article. Because the Press ran numerous single-paragraph items, news 'briefs' of similar content were totalled for each page and recorded as a single categorical entry. For example, six local news briefs equal one local story.

Articles were then categorized according to local news (city and county), state news, regional news (extending to

bordering states and the province of British Columbia, Canada), national news, international news (excluding British Columbia), and general news not fitting any other category. These categories relate specifically to questions concerning amount of local news content.

To gauge political partisanship or bias, four other categories were used. They are: articles promoting a pro-Democratic party slant; articles promoting a pro-Republican party slant; neutral articles that did not state a specific political viewpoint; and articles with a pro-union stance. Although 'unionist' and 'Democrat' were interchangeable during this time period,[16] this final category tallies direct references to the miners' union.

Amount of advertising space was calculated in percentage of total column inches per page and per issue. Advertisers were noted to exemplify who supported the newspaper.

The author coded the content analysis. Tests for reliability involved two research assistants who coded ten newspapers each from the two groupings, November 8, 1890 - October 27, 1891 and November 24, 1891 - July 9, 1892.[17] Based on a coefficient of reliability measure, intercoder agreement of 87.5% is statistically acceptable.

News

Table 1 lists the overall results of this analysis. Of the 1140 articles or editorials recorded, 51% dealt with local

news items. While 87% of these items were politically neutral, 12% showed a Democratic party bias as compared to a 1% Republican party slant. If pro-union articles/editorials are figured in as an indirect Democratic bias, neutral items drop to 84% and Democratic items rise to 15% of the sample.

Since news and editorials were considered separately, Tables 2 and 3 provide more realistic breakdowns. Of the 324 recorded items Aulbach ran on his front page, 73% of them dealt with local news. Not surprisingly, mining was the predominant topic. Aulbach provided information on the transactions, ore strikes, closures, new equipment and mining techniques, fortunes, and activities of miners, mines, and mine owners throughout the Coeur d'Alene district. Each distinct camp had its own heading: 'The North Side,' 'Placer Creek Mining News,' 'Burke News,' and later, the 'Mines and Mining' column.

Other local news Aulbach frequently mentioned included railroad news, "the lifeblood of the Coeur d'Alenes,"[18] municipal affairs/city government reports, fire department news, city construction updates (on hospitals, schools, and other civic buildings), the opening of new businesses, Wallace Board of Trustees or Chamber of Commerce reports, local entertainment and sporting events, local preparation and celebration of holidays, crime, and obituaries of prominent citizens.

Though far behind at 12% of content, state news ranked as Aulbach's second front page priority. Much of this state news was

political reportage. Topics included the Idaho State Legislature, Idaho election results, State Board of Trade information, progress reports from Idaho's U. S. congressmen and senators, the 'Pen and Scissors' column of state news briefs, schools/education, state laws, state taxes, and political party activities.

Occasionally, Aulbach also editorialized on the front page through supposedly straight news stories. Once, for instance, he lamented the fate of Idaho newspapers not fortunate enough to exist in Boise. North Idaho papers were six hundred miles from the capital. Aulbach believed the governor should have recognized this and made a point of getting important political news disseminated properly and fairly: "The capital press should not be fed on cream altogether, and the outside journals on chalk and water."[19]

Eighteen months later, Aulbach treated Republican governor Norman B. Willey just as cordially to front page opinionizing:

> From the very first he has shown lack of judgement, utter incompetency, and official cowardice...we doubt that any state executive has ever before displayed such weakness and imbecility....The people will take care of Willey and his backers next November.[20]

Another front page opinion concerned Aulbach's political sympathies: "The Press is and will remain an independent, Democratic paper so long as I have anything to do with it,"[21] which leads directly to consideration of Aulbach's political leanings.

While local emphasis dominates front page news, it is of secondary concern on the editorial page (Table 3). Twenty-two

percent of the 379 recorded items dealt with local events where both state and national topics each comprised 33% of the total. But the interesting consideration is political slant. Fifty-nine percent of the editorials were politically neutral, but 38% spouted in favor of Democratic party ideals while just 3% spoke well of the Republican party.

There is an important footnote to this Republican 3%. In eleven editorials, Aulbach praised the abilities and worthiness of a Judge Claggett for one of four U. S. Senate positions from Idaho. Claggett was a Republican but from North Idaho and Aulbach considered him honest and far above his Republican competitors. Claggett did not always take the strong Republican line and Aulbach, appreciating this, often defended Claggett. In blasting fickle Republicans picking on Claggett, for instance: "To be a Republican the individual must submit to the party lash without a groan," something Claggett would not do.[22]

Aulbach did praise Democrat party ideals, as this comment on the 1892 Democratic platform:

> It is a grand chart for human rights, and if endorsed ...it will bring blessings to the homes of the people. The adoption of the Republican platform means misery and desolation.[23]

But his prime tactic was to demean all things Republican. Aulbach targeted the Republican-controlled state legislature, the Republican governor, Republican laws, Idaho's Republican U. S. congressmen and senators, the Republican president Benjamin

Harrison, any national Republican politician, and Republicanism period -- as in this passage:

> Republicans have amassed fortunes for themselves and manufacturers -- by their habit of filching the National Treasury -- and the country has been allowed to jog along on its own hook. The wage earner in the meantime has got it in the neck. This is latter-day Republicanism.[24]

In another editorial, Aulbach struck at the "evil" of Republicanism:

> But with [the United States'] growth have come evils. These are due to the Republican party -- evils so glaring, so bad and so deadly in their nature that the country stands on the brink of trouble....It is a party of aristocracy, the party of false pretenses and promises. Nothing has grown from its legislation but evil tendencies.[25]

Aulbach, however, was seldom specific as to what those evils were.

Aulbach also had a talent for turning boosterism into political commentary, as in this passage directed at Republican-backed laws:

> Nature has lavished her charms and richness upon the fair young state, but man has cursed it with a set of laws that make poverty a virtue and thrift a crime.[26]

Attacks on U. S. Senator DuBois show Aulbach's style toward Republican politicians:

> Like every other demagogue he will pluck out the people's eyes, plug up their ears and prostitute their consciences to gratify his insatiate ambition. Woe is to Idaho to elevate such a man to political prominence.[27]

Meanwhile, the state legislature was a particular peeve of Aulbach's:

> This Republican state government is making the people of Idaho a subject of pity from the outside world. No fouler

> combination ever disgraced a people....What can the Republican party do to atone for its colossal sins?[28]

Again, Aulbach was not specific as to what those sins were.

Commentary on two Republican judges and the statutes they codified reflect Aulbach's general position on "Republican lawmaking:"

> They are the stupidest and most conflicting compilation of words perhaps ever printed in the English language.... Of course, such men as these two judges are necessary in high positions to uphold and maintain the principles of the Republican party in the state; but will it not in time open the eyes of the people?[29]

National issues directly affecting the Coeur d'Alene mining district, such as free coinage of silver and silver pricing, were also concerns of Aulbach's:

> ...silver...is lower than it has been in the history of mining through the evils of Republican law and opposition...[30]

> ...A more damnable sin and robbery were never perpetrated by a political party since the formation of the government.[31]

These two statements were made one year apart, but fit together as if from the same editorial. Aulbach was indeed consistent.

While calling the Republican party "fresh, hopeful, ambitious, and uncorrupted" in 1860, Aulbach believed "it is now nervous, uncertain, despondent and diseased....at the mercy of professional politicians, gold-bug agents and Wall Street emissaries."[32] Aulbach firmly believed that only Democratic control would bring Idaho out of its political doldrums. He made a call for "perfect organization...in Idaho...Idaho must be placed in the Democratic column."[33] His was a partisan press.

A very active and proud member of two typographical unions, Aulbach also championed the miners' union of the Coeur d'Alene district.[34] As previously mentioned, laborer and Democrat were very much the same person in 1890 Wallace, as were mine owner and Republican. On this subject Aulbach was quite clear:

> Our sympathies, first, last and all the time are with labor, and we would rather feed on the vapors of the dungeon with a toad than raise our voice or use our pen in support of an unjust effort to drive organized labor to the wars [violence against management]...[35]

Those promoting such an "unjust effort" were members of the Mine Owners' Association (MOA) who, Aulbach believed, were unfair in their labor practices. He attacked the MOA frequently and mercilessly, as in this blast at the MOA-controlled Wardner, Idaho newspaper, the Coeur d'Alene Barbarian:

> American freedom would be a nice plaything in such conscienceless [sic] hands as the "Barbarian Outfit," which embraces the worst elements of the Mine Owners' Association, elements that invade private life, elements that are as rotten as the cesspools of hell, elements that are like unto the whitened sepulchre, woe be unto any people who look for American freedom from such an element -- traducers, destroyers and panderers.[36]

Aulbach was a thorn in the MOA's hand which could not be ignored. During the spring of 1892, increasing labor/management tensions led the mine owners to obtain an injunction from the U.S. court in Boise which directed the Miners' Unions and others to cease interfering with mining operations. This union-busting technique had been perfected during railroad strikes of the 1870s. The Press received a copy.[37]

Whether Aulbach was given a copy of the injunction for informational purposes or whether he was a named defendant is not clear. But he brilliantly exploited the opportunity of being silenced to bring national attention and support to the labor situation in the Coeur d'Alenes. When presented with the injunction, he destroyed two pages of the Press already set in type which reviewed the labor troubles. In its place Aulbach ran two blank columns with the caption: "The injunction knocked this column out." "The Press Gagged," a blazing editorial, accompanied the blank columns:

> ...It will serve to show the thousands who read The Press and the outside public the desperate nature of the cause of a moneyed Association, representing twenty millions of dollars capital when they have to suppress the utterances of the county....The Press has been the people's paper, and because its course has been approved and applauded the Mine Owners' Association desires to crush it. It is the people's rights The Press advocated and defended; it was their citizenship The Press upheld instead of a grinding monopoly....The Mine Owners' Association people claim the right of free speech, free abuse, free vilification, free incendiary talk; but they deny the right of defense of the miners by injunction from a United States Court.[38]

Within days, news of the injunction spread across the nation. The New York World praised Aulbach and encouraged him to violate the injunction by publishing the facts in the interest of a free press, even if it meant going to jail.[39] In his next issue, Aulbach wrote another editorial -- and reprinted three more from other newspapers -- which expressed horror at how this injunction served to defeat liberty.[40]

Others believe that Aulbach was indeed enjoined, not necessarily for his local editorials, but because of his national

audience as the first local Associated Press correspondent. For weeks the mine owners had been seeking the unknown source of articles appearing in several out-of-town newspapers, articles which robbed them of their claim to absolute innocence concerning worker accusations. Learning it was Aulbach's pen defying them, the mine owners may have included him in the injunction.[41] Defendant or not, Aulbach won this round.

In July, after labor tensions erupted into actual warfare, martial law was declared in the Coeur d'Alene mining district. The union, which had violently wrenched control of the mines from management, was subdued and full control returned to the mine owners. Aulbach's political sympathies proved, then, to be his downfall. He had chosen the wrong side and was forced out of town, his passionate Press ironically sold to the opposition Barbarian editor who quickly renamed it the Coeur d'Alene American and reversed its politics.[42]

On a less emotional level, page three content (Table 4), while dominated by 64% advertising, was more equally divided between news types. While still heaviest in local emphasis at 29%, general and national news categories were within one percent of each other as were regional and state divisions. Politics was dispensed with as 95% of the news items were neutral.

With only 2.3 columns available after advertising (see Table 6), Aulbach tended to use filler material on page three which generated a potpourri of news. An Associated Press series,

for instance, on society women from around the world occasionally filled this space. Readers were treated to gossip and line drawings of "Boston's Bright Women," and "The Bright and Well Born Beauties of the Austrian Capital."[43] "Sacred Alters, Monuments to the Gods of Prehistoric Peoples," were discovered by a local prospector in the St. Joe Mountains.[44] The "Origin of the Violin," "Five Ways to Cure a Cold," "Electric Light Plant Nearest South Pole," "Irrational Beauty, The Objections to Lady Bicyclists Founded on Oriental Ideas," and the "International Tug-of-War Tournament" are further examples of general topic items.[45]

Local items would include such topics as court proceedings, municipal affairs, ore strikes, church services, and news from the 'East End' of the valley or the 'North Side' of the county. Delinquent tax lists filled the entire news-hole during January of 1891, as did property assessments on another occasion.[46] Sporting events were also placed on page three, most notably baseball and boxing: "The National Game, Severe Defeats for the Wallace Baseball Players" covered 12 inches while "Sunday's Ball Game" offered a complete statistical breakdown of the contest, and "Corbett's Fight With Jackson" provided John L. Sullivan's next opponent.[47] As labor tensions heated up, Aulbach also saw fit to provide "The Coeur d'Alenes, A Little Political History Dished up to Those Who Need it."[48] Meanwhile, regional topics might include excursion rates to various cities, the coming railroad line, prosperous mining endeavors, and the inevitable

boosterism: "The Coeur d'Alene, A Healthy Growth Predicted with the Coming of Warmer Weather."[49]

On the state front, Aulbach again offered a 'Pen & Scissors' column with "News Gleanings From Every Part of Idaho." Nationally, the Press reported on such things as the upcoming Chicago World's Fair (with special interest in the mineral exhibition), United States court decisions, the free-coinage of silver issue, mining news from other states, and regulations governing the use of timber on public lands.

The back page (Table 5) carried the most consistent news packaging. The 79% local content usually appeared under four recurrent headings. 'Town and Country,' which covered at least the first column of each issue, related comings and goings of citizens and visitors, real estate transactions, news about fraternal organizations, merchants, various business deals, even "another culvert hole on Cedar Street."[50] The other three headings, 'Property Transactions,' 'Locations Recorded,' and 'List of Letters,' succinctly fulfilled their promise. The top right corner always contained post office hours and the Wallace daily train schedule for both the Northern Pacific and Union Pacific railways. What little room remained between these categorizations and the 60% advertising content was filler material, as on page three, or with local/regional events like the opening of a new theatre or "An Official Visit" from the Grand Master of the General Lodge of Idaho I.O.O.F.[51]

Advertising

A direct comparison of advertising content per page (Table 6) suggests that no ads appeared on page one. In actuality, while Aulbach placed no advertising within the front page's column space, two ad spaces were provided along each side of the Wallace Press masthead. Although the amount of editorial page advertising (51%) approached pages three (64%) and four (60%) in volume, Aulbach still left himself nearly an entire extra column for commentary and opinion. Overall, advertising content takes up 44% or 158 of the available 360 column inches in the Press.

Although advertising rates were not published, Aulbach sold to all comers. His list of advertisers is an historical roll call of Wallace merchants and professional people circa 1891. A 'Professional Cards' area listed lawyers, dentists, "plummers"[sic], carpenters, painters, justices of peace, police magistrates, and real estate/collecting agents. Banks, hotels, liquor outlets, saloons, meat markets, hardware stores, furniture stores, livery stables, harness shops, brick yards, railroads, feed stores, mining equipment outfitters, building contractors, restaurants, jewelry stores, bakeries, dry goods & groceries, and tobacco shops all advertised in the Wallace Press. To entice the advertiser, Aulbach even ran an article on page three entitled "Does Advertising Pay?," one full column pushing the merits and substantial returns from publicizing your goods and services.[52] As an advertiser himself, Aulbach frequently announced his own service for job printing.

Subscription rates were published in every issue: $4.00/year, $2.00/six months, $1.00/three months, $.35/one month, and $.10/single copies. These rates were "Always payable in advance. Paper is stopped at expiration of time paid for without further notice" -- unusual for frontier papers which often kept delivering copies in hopes that guilt over accumulating debt would force payment.[53] While circulation figures are unknown, a boast frequently followed subscription information: "The Press has a larger circulation than any other newspaper in Shoshone County."

Discussion

Aulbach's Wallace Press is determinedly local in emphasis. Yet, many frontier journalism historians contend that local news, if even mentioned, was low priority compared to bringing news of the outside world to the local citizenry. Knauss admits to some local news being printed but the emphasis remained on a "variety of foreign and national news."[54] Turnbull writes that frontier readers purchased the newspaper "for everything but the story of what was going on in town."[55] In fact, he continues, compared to the ease of filling a paper with pre-written news, gathering local news items was inconvenient and difficult.[56] This may explain why early Oregon newspapers were giving as little as one column -- out of 28 or 32 -- to local items.[57]

Researchers also mention that frontier editors ignored local news because they lacked reportorial techniques or felt that

readers already knew of local happenings.[58] In his study of Missouri's frontier press, for instance, Lyons concludes that the "pioneer editor was simply not a chronicler of his local community. He felt no compulsion to act as a reporter of local events..."[59] With other newspapers and letters the primary source of news, an editor's largest concern was for national and foreign events with a de-emphasis on local news.[60] Thus, the pioneer editor "made little, if any, effort to go out after the news or to verify what he received."[61]

A few things may help account for the proliferation of local news in the Wallace Press. First, type of frontier: frontier journalism historians focus on agricultural communities, but the Press was a mining camp newspaper. A mining town was as likely to go bust as it was to prosper. This produced a temporary atmosphere with a highly transient wage-earner population. It was a wide-open, unstructured life. The goal of a mining camp editor, therefore, often became the ideal of instilling "a sense of pride, community, and purpose into a random and highly diverse population."[62] Mining town editors were a community-uniting force seeking permanency, who defined and explained the issues that were important to the residents. A miner in 1890 was still a fortune hunter living for the moment, who considered his wage-earner status only temporary.[63] The news important to him was mining news -- local news. Aulbach, like most mining camp editors, realized this and local news came to the front page.

Second, though it was still a frontier area, the world surrounding the Coeur d'Alenes was progressing. Newspapers had to keep pace or fail. Before 1880, newspaper publishers found it more profitable to print specialized content focused on a particular audience, political parties being the standard example. New circulation meant attracting nonreaders. But as Owen points out as "the population of nonreaders declined, publishers came into direct competition for another's readers, forcing changes in their content."[64] The changes to attract those readers were soft news items that matched local interests, a characteristic of the booming eastern commercial newspapers which arose about 1880.

Between 1890 and 1893, nine newspapers circulated in the twenty-mile valley of the Coeur d'Alene River's south fork, five in Wallace alone.[65] Competition for readership must therefore be considered. Also to consider is Aulbach's active membership in both San Francisco and New York City typographical unions. He was in contact with that evolving big city, business-driven journalism based on capturing circulation as an audience to sell to advertisers. This redefined newspapering as marketing tool, and such strategy influenced news content, for material was selected on the basis of its entertainment value to attract readers.[66]

Aulbach answered these dual pressures for readership and marketing by broadening the appeal of his basic news content, not only providing local mining news but by offering the variety of civic and soft news items found on pages three and four. If his

boast carries any weight, he attained one of the larger county circulations. The Press was evolving from the frontier to commercial era.

Further aspects of the contemporary eastern commercial press are also apparent. Since the Civil War, the reporter's art had been changing, producing better news gathering techniques and an increased local emphasis.[67] The telegraph and railroad, for instance, not only brought news of the nation and world, but provided access to regional news. Meanwhile, two assistants helped compose and print the Press, which freed Aulbach for more depth reporting.[68]

Access to the telegraph also influenced reporting and writing styles. Wire services told their stringers that any transmitted copy had to be acceptable to all political interests, for commercial reasons they did not want to alienate a potential client or audience. As a result, reporters became skilled at writing non-partisan or 'objective' news stories.[69] As the first local Associated Press correspondent, perhaps this training took root, for Aulbach did provide full, detailed coverage of issues, most notably local mining events. Still, he could not resist commenting on events, as his front-page editorializing indicates. Locating and analyzing A.P. dispatches penned by Aulbach could be revealing.

Another interest is Aulbach's politics. As described by Heuterman, the second level of frontier political activity is the

newspaper's partisan role.[70] This activity followed transplanting laws and customs to the west and preceded editors becoming civic or political leaders. According to Heuterman, much of the frontier press spoke for the political party that supported them, and did not represent the 'fourth estate' or the citizenry.[71] Extending this, Lyon mentions that most nonpolitical papers eventually became partisan or failed "in the limbo of neutrality."[72] Lyon also writes of how far partisanship can go:

> Thus the pioneer editor, ardent in spirit, devout in the cause, battled for the success of his political principles. Occasionally he carried the struggle into the street, and sometimes he was forced to appear in court. With a religious zeal, he undertook the defense of his party credo.[73]

Meyers concurs that "the pioneer men of print were furious politicians. They snarled over party principles in verse as well as prose...."[74] Cloud adds that few journalists eschewed politics and that the first election ended any resolution of political independence when "publishers exercised their editorial prerogative to promote their favorite parties.[75]

Though on a different frontier, Aulbach did operate at the second level of frontier newspaper political activity -- his was a partisan Democratic newspaper, something that commercial newspapers avoided for fear of limiting circulation and losing advertisers. Yet Aulbach's partisanship is clear on the editorial page and even from front page articles where objectivity is sometimes scarred by his inability to refrain from commenting on events.

Aulbach was also quite consistent. For the entire run of the newspaper he made it clear where he stood and never backed down. This consistency, or perhaps "religious zeal," dragged Aulbach into the injunction battle and eventually drove him out of Wallace, for Aulbach's promotion of all things labor-read-Democrat put him on the losing political side when ownership regained control of their mines. On the other hand, though Aulbach never turned his published party loyalty into the ultimate step of becoming a political or civic leader, he gained followers and respect from the miners he championed.[76] This aspect of representative news coverage, driven by whatever political motive, opposes the frontier press generalization that the local citizenry was often ignored by frontier editors.

A final concern was revenue. The success of frontier newspapers depended on brash business tactics, political savvy, and a shot of good luck.[77] An editor had to consider a variety of factors before deciding whether a town or region could even support his efforts. Advertising, for instance, constituted a major part of content, sometimes filling over half the paper.[78] Thus, a reasonable number of merchants, bankers, doctors, lawyers, and craftsmen had to precede thoughts of a newspaper, as did a sufficient level of subscribers, although obtaining subscription payment was often a losing battle for most frontier editors.[79] Since advertisements and subscriptions often failed to fully support a paper, printers also published a wide range of products

from orations and sermons to books, texts, and minutes of meetings.[80]

Public or government printing became another important revenue source.[81] The extra income from local, state, or even national government, and job printing such as handbills and broadsides provided subsidies that often made or broke a frontier newspaper. Meanwhile, political party leaders sought or established newspapers to spread their doctrine and garner support at the polls, and they were willing to pay for it. Stratton identifies two reasons why editors often jumped on a political bandwagon: poverty -- it was hard to develop sufficient revenue so editors had to rely on the investments of politicians; and competition -- opposing the winning candidate could bankrupt an editor, for political pressure could dry-up future ad revenue and job printing.[82] Beginning with the penny press of the 1830s, however, advertising became the primary revenue source for many non-partisan newspapers.[83] A penny press editor would thus eschew politics for fear of losing both advertisers and subscribers. Surprisingly, as the press evolved into an industry and newspapers became a commodity, ad content actually dropped to 25% by 1890.[84]

The 44% ad content of Aulbach's Press thus splits the difference between frontier era and early commercial newspapers, indicating only that advertising did provide a primary revenue source. Another revenue source was job printing, as indicated by

Aulbach's recurring self-advertisement. However, there is no indication of political party or union subsidy, although the possibility remains.

The predominantly professional and merchant advertising reflects the frontier press as opposed to the product advertising increasingly found in big city commercial papers.[85] But as transportation and communication improved around the country, advertising did become less localized. Expanding business and industry sought regional, even national, distribution while people were becoming more mobile, more region-conscious. This time reflecting commercial papers, the Press responded by running ads for regional businesses, usually mining supply outfitters and hotels in Missoula, Montana and Spokane, Washington.

Conclusion

Content analysis of the Wallace, Idaho Press of 1890-1892 reveals a hybrid journalism that combines elements of an emerging eastern commercial press with an earlier tradition based in agricultural frontier newspapers. This transitional journalism reflected its locale, a wageworkers' mining frontier that was itself in "transition from wilderness to industrial, post-frontier society."[86]

Exhibiting its mixed origins, this compromise journalism produced contradictory services. While striving for objective reporting, accepting all advertisers, and seeking a broader

circulation through soft news, for instance, it still expounded partisan politics. Yet no evidence indicates that the Press' partisan role was controlled by financial backers, the common frontier situation. Perhaps as a union man himself, Aulbach promoted and represented a cause he believed in without regard for financial consequence, to the point of designating himself as a union spokesman. But the most distinctive break from frontier newspapering is that the Press emphasized local news, a hallmark of the commercial press. It laid a foundation for financial independence by providing news its readers wanted.

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TABLE 1 - Summary of the Wallace Press content analysis.

Total articles/editorials coded for 38 of 90 issues:	1140*
Local emphasis:	.51
Regional:	.10
State:	.15
National:	.17
International:	.01
General:	.06
Items with Democratic bias:	.12
Republican bias:	.01
Neutral:	.87
Pro-Union bias:	.03
Advertising content:	.44

*Total news briefs for each page marked as one item.

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TABLE 2 - Summary of front page content.

Total articles:	324
Average per issue:	8.5*
Local emphasis:	.73
Regional:	.05
State:	.12
National:	.09
International:	.006
General:	.004
Items with Democratic bias:	.03
Neutral:	.97
Pro-Union bias:	.02
Advertising content:	.00

*Total news briefs for each page marked as one item.

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TABLE 3 - Summary of page two (editorial) content.

Total editorials:	379
Average per issue:	10
Local emphasis:	.22
Regional:	.09
State:	.33
National:	.33
International:	.01
General:	.01
Items with Democratic bias:	.38
Republican bias:	.03
Neutral:	.59
Pro-Union bias:	.11
Advertising content:	.51

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Table 4 - Summary of page three content.

Total articles:	247
Average per issue:	6.5*
Local emphasis:	.29
Regional:	.15
State:	.14
National:	.19
International:	.03
General:	.20
Items with Democratic bias:	.05
Republican bias:	.0
Neutral:	.95
Pro-Union bias:	.0
Advertising content:	.64

*Total news briefs for each page marked as one item.

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Table 5 - Summary of back page content.

Total articles:	190
Average per issue:	5*
Local emphasis:	.79
Regional:	.09
State:	.02
National:	.06
International:	.0
General:	.04
Items with Democratic bias:	.0
Republican bias:	.0
Neutral:	1.0
Pro-Union bias:	.0
Advertising content:	.60

*Total news briefs for each page marked as one item.

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Table 6 - Summary of average advertising column inches per page.

Page	amount in columns (1 col.= 15 in.)	inches	page percentage
1	0	0	0
2	3	46	.51
3	3.7	58	.64
4	3.6	54	.60

Overall advertising content of the Wallace Press: 44%

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NOTES

[1]Frederick Jackson Turner, The Significance of Sections in American History (New York: Holt, Rinehart & Winston 1933); The Frontier in American History (1920; reprint, Huntington, N.Y. 1976).

[2]Carlos A. Schwantes, "The Concept of the Wage Workers' Frontier: A Framework for Future Research," Western Historical Quarterly (January 1987): 41.

[3]Schwantes, op. cit., p. 41.

[4]Schwantes, op. cit., p. 40.

[5]Schwantes, op. cit., p. 43. Also see pp. 51-52 for the "dream of special opportunity awaiting wageworkers who moved west."

[6]Schwantes, op. cit., p. 42; For description of the Coeur d'Alene district see Richard G. Magnuson, Coeur d'Alene Diary: The First Ten Years of Hardrock Mining in North Idaho, 2nd ed. (Portland, OR: Binford & Mort 1983); Vernon H. Jensen, Heritage of Conflict: Labor Relations in the Nonferrous Metals Industry up to 1930, chap. IV "The Coeur d'Alenes, 1892" and chap. VII "The Coeur d'Alenes, 1899" (Ithaca, N.Y.: Cornell University Press 1950); Mark Wyman, Hard Rock Epic: Western Miners and the Industrial Revolution, 1860-1910 (Berkeley: University of California Press 1989); Robert W. Smith, The Coeur d'Alene Mining War of 1892: A Case Study of Internal Dispute (Corvallis: Oregon State University Press 1961).

[7]Magnuson, op. cit., pp. 12-16; John Fahey, The Inland Empire: Unfolding Years, 1879-1929 (Seattle: University of Washington Press 1986): 174-175.

[8]"Souvenir -- Coeur d'Alene Mining District," presented by Wallace Aerie No. 54 F.O.E. (Eagles), 1906.

[9]John P. Vollmen, History of North Idaho (Portland: Western Historical Publishing Co. 1903): 1204-1206.

[10]Vollmen, p. 1205.

[11]N. Avon Wilson, "The Pack Mule Press" (Undergraduate term paper, University of Idaho, 1938): 16-17.

[12]Magnuson, op. cit., p. 9.

[13]Wilson, pp. 22-25.

[14]Vollmen, p. 1205.

[15]Ole R. Holsti, Content Analysis for the Social Sciences and Humanities (Reading, MA: Addison-Wesley 1969): 14, 127.

[16]Magnuson, op. cit., pp. 180-187.

[17]Coefficient of Reliability, C.R. = 2M / N1 + N2 where M is the number of coding decisions on which the two judges are in argeement, and N1 and N2 refer to the number of coding decisions made by judges 1 and 2 respectively, Holsti, op. cit., p. 140. In the first test, each coder (the author and research assistant #1) identified and categorized twelve themes. They agreed on ten (politically neutral articles and categorizing news briefs into articles were questioned). Based on this, C.R. = 20/24 = 83%. In the second test, each coder (the author and research assistant #2) identified and categorized twelve themes, agreeing on eleven (categorization of news briefs into articles again met with differences). Thus, C.R. = 22/24 = 92%. 83+92/2 = 87.5%

[18]Wallace Press, 27 December 1890

[19]Wallace Press, 22 November 1890

[20]Wallace Press, 9 July 1892

[21]Wallace Press, 13 December 1890

[22]Wallace Press, 19 March 1892

[23]Wallace Press, 9 July 1892

[24]Wallace Press, 6 February 1892

[25]Wallace Press, 9 July 1892

[26]Wallace Press, 23 May 1891

[27]Wallace Press, 18 July 1891

[28]Wallace Press, 16 April 1892

[29]Wallace Press, 16 January 1892

[30]Wallace Press, 20 February 1892

[31]Wallace Press, 1 August 1891

[32]Wallace Press, 15 August 1891

[33]Wallace Press, 15 August 1891

[34]New York Typographical Union No. 6 and charter member/chairman of the constitution & by-laws committee of San Francisco Typographical Union No. 21. See Magnuson, op. cit. p. 211

[35]Wallace Press, 9 April 1892

[36]Wallace Press, 7 May 1892

[37]Magnuson, op. cit., p. 192.

[38]Wallace Press, 14 May 1892

[39]As reprinted in the Wallace Press, 4 June 1892

[40]Wallace Press, 21 May 1892: Including the Spokane Spokesman, the Malad Enterprise, the Spokane Chronicle.

[41]Wilson, op. cit., pp. 38-39.

[42]Magnuson, op. cit. p. 252.

[43]Wallace Press, 15 November 1891, 10 January 1892

[44]Wallace Press, 20 December 1891

[45]Wallace Press, 28 March 1891, 18 April 1891, 8 August 1891, 19 September 1891.

[46]Wallace Press, 19 September 1891

[47]Wallace Press, 20 June 1891, 8 August 1891, 7 May 1892.

[48]Wallace Press, 18 February 1892.

[49]Wallace Press, 25 April 1891.

[50]Wallace Press, 20 December 1891

[51]Wallace Press, 16 May 1891, 16 January 1892.

[52]Wallace Press, 28 March 1891

[53]See for instance, William H. Lyon, The Pioneer Editor in Missouri, 1801-1860 (Columbia: University of Missouri Press 1965): 88-89.

[54]James Owen Knauss, Territorial Florida Journalism (Florida State Historical Society No. 6, Deland 1926): 16.

[55]George S. Turnbull, History of Oregon Newspapers (Portland: Binford & Mort 1939): 19.

[56]Turnbull, op. cit., p. 14.

[57]Turnbull, op. cit., p. 448.

[58]Knauss, op. cit., p. 16; Lyon, op. cit., p. 162; Turnbull, op. cit., p. 19; Reuben Gold Thwaites, "The Ohio Valley Press Before the War of 1812-15," Proceedings of the American Antiquarian Society, New Series 19: 352.

[59]Lyon, op. cit., p. 47.

[60]Lyon, op. cit., p. 43.

[61]Lyon, op. cit., p. 159.

[62]David Fridtjof Halaas, Boom Town Newspapers: Journalism on the Rocky Mountain Mining Frontier, 1859-1881 (Albuquerque: University of New Mexico Press 1981): 100.

[63]Schwantes, op. cit., p. 44.

[64]Bruce M. Owen, Economics and Freedom of Expression (Cambridge, MA: Ballinger Publishing Co. 1975): 46.

[65]The Wallace Press (later Coeur d'Alene American), Wallace Democrat, Wallace Daily Advertiser, Wallace Idaho State Tribune, Wallace Free-Press, Wardner/Wallace Coeur d'Alene Barbarian, Mullan Panhandle-News, Mullan Tribune, Osburn Observer, list compiled through University of Idaho Microforms.

[66]Don R. Pember, Mass Media in America, 5th ed. (Chicago: Science Research Associates 1987): 29.

[67]Lyon, op. cit., p. 141; Pember, op. cit., pp. 28-35; Edwin Emery and Michael Emery, The Press and America: An Interpretive History of the Mass Media, 5th ed. (Englewood Cliffs, N.J.: Prentice-Hall 1984): 191-222.

[68]Magnuson, op. cit., p. 186.

[69]Fred Siebert, Theordore Peterson, and Wilbur Schramm, Four Theories of the Press (Urbana: University of Illinois Press 1956): 60; James W. Carey, "The Communications Revolution and the Professional Communicator," The Sociological Review Monograph 13 (January, 1969): 32-33 and "Technology and Ideology: The Case of the Telegraph," Prospects: The Annual of American Cultural Studies Vol. 8, Jack Salsman, ed. (New York: Cambridge University Press 1983): 310-311.

[70]Thomas H. Heuterman, Moveable Type: Biography of Legh R. Freeman (Ames: Iowa State University Press 1979): 143.

[71]Heuterman, Moveable Type, p. 84.

[72]Lyon, op. cit., p. 47.

[73]Lyon, p. 84.

[74]John Meyers Meyers, Print in a Wild Land (Garden City, N.Y.: Doubleday and Co. 1967): 142.

[75]Barbara L. Cloud, "A Party Press? Not Just Yet! Political Publishing on the Frontier," Journalism History 7 (Summer 1980): 73.

[76]Magnuson, op. cit., p. 252.

[77]For a discussion of financial difficulties of frontier newspapers, see J. Cecil Alter, Early Utah Journalism: A Half Century of Forensic Warfare, Waged by the West's Most Militant Press (Salt Lake City: Utah State Historical Society 1938): 9; Rhoda Coleman Ellison, Early Alabama Publications: A Study in Literary Interests (University: University of Alabama Press 1947): 15; Elizabeth Keen, "The Frontier Press," Studies in Literature of the West University of Wyoming Publications 20 (1956): 108; Lyon, op. cit. pp. 8, 33, 123.

[78]Lyon, op. cit., pp. 147-151; Heuterman, "Assessing," p. 425.

[79]Lyon, op. cit., pp. 87-96.

[80]Lyon, op. cit. pp. 106-107.

[81]Lyon, op. cit., pp. 8, 50-56, 64-66; Ralph E. Dyar, News for an Empire: The Story of the Spokesman-Review of Spokane Washington, and of the Field it Serves, (Caldwell, ID: The Caxton Printers, Ltd. 1952): 3-23.

[82]Porter A. Stratton, The Territorial Press of New Mexico, 1835-1912 (Albuquerque: University of New Mexico Press 1969):199.

[83]W. G. Bleyer, Main Currents in the History of American Journalism. (Boston: Houghton Mifflin 1927): 183-184; Emery & Emery, op. cit., p. 142; F. Hudson, Journalism in the United States, from 1690-1872. (New York: Harper 1873): 419-420; M. Schudson, Discovering the News: A Social History of American Newspapers. (New York: Harper 1978): 19-20.

[84]Cited as 25% ad content in 1880, Pember, op. cit., pp. 28-30.

[85]Pember, op. cit., p. 29.

[86]Schwantes, op. cit., p. 41.

THROUGH A LENS CLEARLY:

WOMEN AND THE EVOLUTION OF WORLD NEWS

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ABSTRACT

THROUGH A LENS CLEARLY:
WOMEN AND THE EVOLUTION OF WORLD NEWS

Carolyn M. Byerly

The article considers the ways in which the UNESCO-funded women's feature services have addressed women's fundamental problems in world news: exclusion as news subjects, stereotypic (and otherwise negative) portrayal, and low-participation rates as news professionals. The article is especially concerned with the ways in which these services, located in the developing nations of Africa, Asia, the Caribbean, Latin America, and Middle East, have provided a mechanism for Third World women's voices to be heard and their own images and meanings to be constructed. She finds that the women's feature services have expanded information about women from the developing world in world news flow, have established guidelines and newsgathering routines to better represent women's lives and achievements in newsmaking processes, have increased the pool of women journalists trained to write about women's lives from new perspectives, and have provided rich sources for the development of Third World women's histories.

THROUGH A LENS CLEARLY:
WOMEN AND THE EVOLUTION OF WORLD NEWS

> [W]oman's selfhood, the right to her own story, depends upon her "ability to act in the public domain."
>
> Carolyn Heilbrun
> Writing a Woman's Life

INTRODUCTION'

By the time delegates reached Mexico City in July 1975, to attend the first of three U.N. Decade for Women conferences, they already had the pieces for what would become women's first World Plan of Action. One of those pieces would call for women's greater involvement in shaping the news of the world -- a task long overdue.

This article follows women's determination to forge a role for themselves in world newsmaking from the conference bargaining tables to the editing tables of women-controlled news services, between the years 1975 and 1989. The principal concern in the article is the contributions that the five original, UNESCO-funded women's feature services have made to world news flow and, to a lesser extent, to world newsmaking processes, particularly with regard to the Third World regions they served -- Africa, Asia, the Caribbean, Latin America, and the Middle East.

The research presented here addresses questions about how the women's feature services have (1) included women as the subjects of news, (2) conveyed women's contributions to their

societies, (3) increased women's rate of participation as media professionals, and (4) otherwise articulated women's particular concerns in the developing nations where they have operated. The findings presented here are drawn from my doctoral dissertation, which is a fuller examination of the contribution that the women's feature services have made to world newsmaking, particularly with respect to the intervention strategies they employed to convey new information about the role of women in development through already established, male-controlled news agencies.

The research is based on letters, memoranda, contracts, reports, and other documents contained in the women's feature service files at the UNESCO archives in Paris, on interviews with the Inter Press Service's Women's Feature Service staff in Rome, on recent correspondence with staff of the Depthnews Women's Service in Manila, recent published and unpublished research, and the texts of news features produced by two of the women's feature services.

WOMEN, MEDIA AND THE THIRD WORLD, 1960s AND 1970s

Women's critique of the mass media grew out of the remobilization of popular feminist movements in the late 1960s and early 1970s. That critique was three-pronged. First, feminists said, the news media had failed to include women as the subjects of serious news and entertainment programming. Second, they said that when the media did include women as subjects, it was in a negative light. Sex role stereotyping of women -- e.g., portraying women as inferior to men and locked into their caretaker/sex object roles -- was the primary charge related to negativity. Third, feminists argued that

few women held creative or decision-making roles within media industries, and this limited women's ability to convey their own experiences and meanings through the media.

The early empirical research, conducted by university scholars, governmental groups like UNESCO, and nongovernmental women's groups like the U.S. National Organization for Women and the Latin American-based Interamerican Commission of Women, confirmed these charges (Busby 1975; Ceulemans and Fauconnier 1979; Gallagher 1979, 1981). The media's widespread discrimination against women persisted throughout the world. Ceulemans and Fauconier's cross-cultural review from this period (1979) is one of the most descriptive and comprehensive. In the context of the present discussion, which is concerned with women and news, the authors conclude that:

> [TV] news programmes largely ignore women's participation in society, as reflected in women's limited visibility as reporters and newsmakers, and the discriminatory treatment of women's issues (p. 27),

And that:

> Newspaper images of woman define [woman] in terms of her relationships to men. They emphasize her maternal and marital roles, and her function as a sex object for male perusal. . . (p. 38).

In magazines, an alternative source of information for women, the authors found that:

> The research documents analysing the portrayal of women in women's magazines, with the exception of those in the socialist European countries, are highly consistent in their findings. . . The absence of images of independent women and employed women reinforces the strict delineation of women's vs. men's roles. Recent attempts to introduce new images inspired by the emerging changes in women's identity and social status merely represent adaptations of the conventional concepts which remain fundamental and unquestioned. . . (p. 47).

Longitudinal studies found that the problem of women's exclusion from news and information had been a long-term phenomenon in most nations. For example, Gallagher (1981) cites a Lebanese study which found that only 4 percent of the space in Lebanese newspapers between 1935 and 1975 had concerned women. Morris (1972) and Tuchman (1978-a) of the United States, and Fukao (1976) of Japan, found that even as women's status and roles in society began to advance and expand in the 1960s, the media ignored or trivialized these events and focused, instead, on women's traditional domestic and sexual roles.

How did international news agencies fare in their women's coverage in this period? One study, conducted by the Rome-based Inter Press Service, found that only between 1 and 1.5 percent of the stories carried by major transnational agencies was related to women's issues (Gallagher 1981:146).

The problem of exclusion from news and information cited by feminists was, in one respect, a quantitative one related to news flow. An absence of accurate, up-to-date information about and for women in both national and international print and broadcast news meant that people would know little about women's real experiences, achievements, problems, and participation in society, either historically or presently. Invisibility created what Tuchman (1978) deemed a kind of symbolic annihilation for women in the media. Increasing news flow about and for women would be a priority when feminists around the world looked to solutions.

Like the problem of news flow, the second problem, women's portrayal, was essentially a product of male-superior values and

personnel practices that dominated the news industries. The media industries all over the world are, by and large, owned by U.S. and European male-controlled corporations whose products reflect western elitist values, decisions (Gans 1979; Galtung and Ruge 1981), and a male-centered perspective (Gallagher 1979, 1981; Ceulemans and Fauconnier 1979). Women's professional participation and women's concerns had not been a major part of newsmaking processes through the 1970s (Gallagher 1981). Not to be underplayed are the hundreds of women-owned or managed magazines and book publishing houses, particularly in England and Europe during both the suffrage movement (late 19th and early 20th centuries) and the remobilized women's movements of the 1960s and 1970s. As Steiner has argued (1983), these publications helped to create political and cultural dialogues among women, as well as a sense of common purpose, or community. But their usefulness to women and men outside the movement was limited. Feminists would have to confront the structural and philosophical barriers in news industries in order to gain access for themselves and their concerns in world newsmaking. This would require them to create their own news mechanisms to intersect conventional, mainstream, male-controlled news systems.

The emergent feminist analysis of the mass media and, more particularly, the news media, developed side by side with the media critique put forth by non-aligned nations of the Third (i.e., developing) World. Mustapha Masmoudi of Tunisia, one of the most vocal critics, charged the dominant western-owned news agencies (i.e., Associated Press and United Press International of the U.S., Reuters of Britain, and Agence France Presse of France) with mostly ignoring

the Third World in their news production. This resulted in "a flagrant quantitative [news flow] imbalance between North and South," he said (Masoudi 1984:14). Moreover, the portrayals of developing nations in news were unfair and inaccurate, he said. Instead of covering these nations' serious efforts and progress toward national development, the western press focused on disasters (like famines and earthquakes) and crises (like political and economic instability). This situation created a qualitative problem leading to "de facto hegemony" and a will of the northern/western nations to dominate those of the southern/eastern hemispheres. This neo-colonialism pattern in news and information served to reinforce former economic and political arrangements among have and have-not nations and deprived the developing nations of the important information they needed to become stable and automous economically, politically, and culturally (Masmoudi 1984).

Many leaders from the developing world called for a New International Information Order (NIIO) that would alter this imbalance in world news flow, increasing news and information among states in the southern hemisphere and providing greater access to communications technology and resources to train their technical and media personnel (Masmoudi 1984).

Gallagher (1981) and Rush and Ogan (1989) have pointed out that while the feminist and Third World media critiques had many common elements, they were separate dialogues. Both critiques challenged the problematic unequal power relationships between themselves and the dominant western, elite news industries. Both indicted these industries for marginalizing them by providing too

little information and by conveying unfair, often inaccurate images of their respective constituencies. Both sought to remedy the problem by increasing news and information about themselves and by creating a bigger role for themselves in newsmaking processes.

The separateness of the two dialogues is important in the context of the present discussion, because it helps to explain the direction that women's solutions took by 1975, when the U.N. Decade for Women got underway.

Third World male leaders had formulated the tenets and substance of the NIIO debates without the involvement of women and without considering the specific ways that communications issues intersected women's conditions. The early literature of the NIIO and its parent movement, the New International Economic Order, is completely devoid of women's voices and concerns. This reflects the larger context of power relations between men and women in these years, particularly in Third World development efforts.

Anand (1983), Charlton (1984), Rogers (1980), Boulding (1980) and other scholars of women and development issues agree that women were never really factored meaningfullly into Third World nations' efforts to move toward political and economic stability and self-determination. Anand says that development followed mainstream or Marxist models, both of which were patriarchal in orientation and did not, consequently, take women's present productive and reproductive (i.e., child bearing and rearing) roles in agricultural and domestic settings into account. Instead, she says, "modernization" efforts moved women toward low-paid, unskilled urban jobs or into re-structured agricultural systems aimed at high-yield cash crops (Anand

1983). Such patterns often displaced women from the familial or community positions of power they had held. In addition, illiteracy was highest among women in developing nations (as elsewhere), and women had little access to formal or informal educational systems that might raise their awareness of national events or their possible roles in it. Anand stated:

> If education is to have any value for women, it must raise their consciousness about the oppressive structures that keep them in positions of powerlessness. Most educational systems do not provide a climate for such thinking skills to develop. . . When a woman is relatively powerless, . . . what she craves is knowledge of why she must bear so many children, work endless hours without respite, be beaten and raped, have an alcoholic husband, and go hungry (Anand 1983:7-8).

Working through the U.N. Commission on the Status of Women, a subsidiary of the U.N. Economic and Social Council, women were able to secure a development decade of their own. The official U.N. Decade for Women was designated by the U.N. General Assembly in 1974 and would begin the following year. The International Women's Year Conference in Mexico City, July 1975, would be the first of three conferences marking the beginning, middle and end of the decade. The decade theme, "Equality, Development, and Peace," signaled official world governments' recognition of women's right to a role in major national processes, like development, and international processes, like peacemaking.

WOMEN'S MEDIA AGENDA IN THE U.N. DECADE FOR WOMEN

The World Plan of Action, adopted by U.N. conference delegates in Mexico City, brought to light the interrelationship between

fertility patterns, demographic trends, socio-economic development, and the status of women around the world. In accordance with the conference theme, the plan focused primarily on these conditions and their alleviation in developing nations. The status of women, it said, is both a determinant and a consequence of these various factors. Moreover, it is inextricably linked to both the development process and the various components of demographic change (UNFPA Project Request, July 1, 1976).

The plan repeatedly underlined the potential of the mass communications media to foster social change, observing that a major obstacle in improving the status of women lies in public attitudes and values regarding women's role in society. The mass media, it says, could exercise a significant influence in helping to remove prejudice and stereotypes, accelerating the acceptance of women's new and expanding roles in society, and promoting their integration into the development process as equal partners. But the concepts of access, participation, and self-determination underlying the plan are almost the antithesis of the centralized systems of control that characterize mass media systems throughout the world (Gallagher 1981). The need emerged, during discussions, therefore, for an alternate mechanism which could generate news and information for women through mainstream channels of mass communication. The problem lay in how to identify the persons and agencies that would be willing to support and assist in something such as a network of women's feature services (UNFPA Project Request, July 1, 1976).

As sponsor of the Decade for Women, the U.N. and its specialized agencies were responsible for implementing any action

items that fell within its various domains. In anticipation of this follow-up role, two U.N. agencies, the Educational, Scientific, and Cultural Organization (UNESCO) and the Department of Economic and Social Information (DESI) had organized a two-day Media Workshop to take place immediately after the conference adjourned.

In line with the conference's focus on women and development, the Media Workshop focused its discussion on strengthening cooperation and exchange among women through both new and existing systems of communication, especially in the Third World. Participants identified ways that the mass media might be involved in the implementation of the plan, and they called on UNESCO to "collect data and undertake studies of existing information networks and systems which might cooperate in promoting a regular service of news, information, and background on women's issues" (UNFPA Project Request, July 1, 1976).

In support of this new mandate for world media to be involved in advancing the status of Third World women, many journalistic themselves joined in the cause. In Bangkok, in September 1975, the Asian Broadcasting Union and the Public Relations Department of the government of Thailand cosponsored a Seminar on the Role of Broadcasting in International Women's Year. There, broadcast journalists from Asia embraced the acceptance of women's changing role in society and agreed that they should strive for broadcast programs to foster it. Similarly, the Arab States Broadcasting Union and Radio-Television organization conducted a seminar in Tunis in December, where they recommended an exchange of programs, information and personnel.

And in February 1976, at a special U.N. General Assembly task force on the integration of women into development, members recognized

that poverty, "poor health and malnutrition, often accompanied by high fertility rates, infant mortality . . and traditional and cultural attitudes toward women's role in society" as major stumbling blocks toward women's advancement. Task force members recommended that the U.N. agencies help promote information and programs that would foster change.

CONCEPTUALIZATION AND FUNDING OF THE WOMEN'S FEATURE SERVICES

These events provided the institutional framework for UNESCO's role in women's media activities. Just a year after the Mexico City conference, UNESCO presented its project request for "The Creation of (1) Features Syndicates and (2) Audio-Visual Bank(s) for the generation and Dissemination of Features and Programmes for and about Women and Population" to the U.N. Fund for Population Activities (UNFPA). The request was for $132,600 for fiscal years 1977 and 1978 to "promote worldwide action aimed at the advancement of women, with special reference to their right to determine fertility and their fuller involvement in political, social, economic, and cultural life, and in the development process" (Ibid.). This would include generating and disseminating news features, films, radio and other materials. The first objective was to establish a syndicate of women's feature services.

The project's direction was no accident. Yvette Abrahamson, program specialist in UNESCO's Population Division, Paris, had been integrally involved in the events that led up to this moment, and she would remain the women's feature services' key inside advocate. Her files from this period, now part of UNESCO's archives, document the

extensive network of support in the developing world she began to create for a women's feature network, even before UNFPA had approved funding.

The women's feature services were designed to be controlled and operated by women, within the sponsorship of established news agencies. Their purpose was "to disseminate information among individuals and organizations who could influence and promote women's status, roles, and participation in population and development programs" (UNFPA Project Report, June 30, 1979). Abrahamson had little success when she approached "big four" members about sponsoring a women's feature service. They did not see how to interface a news-feature format into their standard "spot news" orientation, and they already had a network of correspondents (mostly male) who served their personnel needs (Gallagher 1981). Claude Roussel, director of Agence France Presse, indicated he would talk with his own personnel about forming an AFP women's news syndicate, and, similarly, Reuters said that it would develop its own material (Abrahamson 1978).

Only one major international news agency, Inter Press Service, had shown long-standing support for the idea of women-oriented news features that were now proposed. IPS had been established in 1964 to promote news exchange and social change among and within the developing nations, many of them newly independent. IPS Director Roberto Savio, an Italian journalist who had headed IPS' predecessor agency, the Roman Press Agency, saw the mission of IPS to be providing a way for "new actors" to be heard. Savio had attended the media and women meetings in Mexico City in order to show support and to offer his agency's services in creating a mechanism for women's news (Savio 1989).

UNESCO contracted with IPS to sponsor two of the women's feature services. The Oficina Informativa de la Mujer (OIM), the first of the services, was established early in 1978 through the IPS Costa Rican field office to serve the Latin American region. A year later, IPS established the African Women's Feature Service (AWFS) under a separate UNESCO contract. In each case IPS hired women journalists to manage the service and to produce the requisite number of features per year.

UNESCO next contracted with the Christian Action for Development agency in Barbados to sponsor the Caribbean Women's Feature Syndicate (CWFS) in 1978 to serve the Caribbean region. These materials would be distributed by the Caribbean News Agency (CANA). That same year UNESCO secured the establishment of the Asian women's feature service through the Press Foundation of Asia, located in Manila. This service would be known as the Depthnews Women's Service, taking its name from PFA's Depthnews Feature Service already in operation.

Finding sponsorship of a Middle Eastern women's feature service was more challenging. The region was beset by complex political problems which made it difficult for Abrahamson's office to select a sponsor from among several Middle Eastern news services. Her office contracted first with the Regional Arab Centre for Information Studies on Population, Development and Construction, located in Cairo, to begin in May 1979. However, the ACISPDC, which was financed by Saudi Arabia, Kuwait, Iraq, Qatar, Jordan, the United Arab Emirates, Oman, Syria, and other nations, was boycotted by "all professional and political organizations in the Arab World," according to Dr. Farid

Ayar, secretary general of the Federation of Arab News Agencies (FANA) (Ayar 1979).

This situation, together with ACISPDC's lack of productivity, forced UNESCO to abrogate the contract. She turned instead to FANA, which had shown considerable support for the idea of a women's service. Headquartered in Beirut, FANA planned to use its field offices in Baghdad and Tunis to facilitate comprehensive coverage of women's issues in the Arab world. This fifth and last women's feature service began operation in 1980 and was named the Arab States Women's Feature Service (ASWFS).

Thus, between 1978 and 1980 all five women's feature services were up and running in their respective regions. To better insure their success, Abrahamson's office underwrote journalist recruitment and training programs and funded consultations aimed at technical and administrative improvements in each of the five programs.

OPERATIONS, PRODUCTIVITY AND PROBLEMS

Although budgets, administrative style, and staffing varied from one women's feature service to another, some general comments can be made about their operations. UNESCO funding ranged from $5,000 per year (for the Caribbean Women's Feature Service) to $30,000 per year (for both the African Women's Feature Service and the Oficina Informativa de la Mujer). UNESCO provided additional funds for materials, translations, and training of journalaists. All of the services received additional funding from their parent agencies and from outside sources, such as the World Association for Christian Communication and other progressive church-related groups. The

services tended to have a director in the home office who was responsible for the hiring of correspondents and stringers, commissioning, and distributing the stories (UNFPA Project Request 1982-1983). Correspondents and stringers in the various nations (of each region) were often women journalists who sought extra work and/or a place to direct their own energetic concerns about women's conditions.

UNESCO played a central coordinating role in terms of creating and sustaining links between the services themselves and between the U.N. and other organizations. UNESCO also provided administrative and funding support and served as the record-keeping arm of the project.

Services produced stories in English, as well as the primary regional vernacular (e.g., Arabic or Spanish). Once stories went out over newswires or in the mail and reached their destinations, they were translated into the local language of user media.

To characterize the news features written and distributed by the five women's feature services would be to recount not only the themes of world feminist movements these last two decades, but the particular way those themes pertain to women in the developing world. Health care and childbearing were prominent topics, as were nutrition, literacy, education, employment/unemployment (and other labor issues), women in agriculture, and the effects of war and political instability on the lives of women and children. Articles probed the cultural, political, and economic roots of women's oppression and tried to highlight the efforts that women (and governments) were making to advance women. Typical story titles were "Working Women's Rights" and "The Toils of a Crabwood Creek Farmer" (from CWFS), "Better to Abort

than to Lose the Job" and "The Double Day" (DIM), "I Felt It Was Unsafe to Live with Him," and "Women Always at Losing End of Divorce in Bangladesh" (Depthnews Report 1990).

The goals of features were to stimulate interest and involvement in raising women's status -- economically, politically, and socially. This meant that stories typically challenged traditional norms and attitudes about women's role in family and society -- norms and attitudes that perpetuated women's secondary social position and that might be held by men and women alike. By using both personal testimonies of ordinary women and the expert opinions of feminist or governmental leaders to develop story themes, writers strived to reach the average citizen as well as the decision maker.

News features dealt with topics of current concern to women, such as poverty or wife battering, and might mention recent meetings or other events that would emphasize the timeliness of subject matter. However, stories were truly "news features," intended to be useful for longer periods of time than event-oriented news -- an enticement to editors and news directors to keep and use them. Stories also tried to make a connection between the central issue and other local and national developments. This provided both context and analysis for information. Thus, female illiteracy rates might be discussed in terms of national educational programs, and wife beating might be discussed in relation to government programs to strengthen families.

Each regional service distributed stories to several hundred daily and weekly periodicals, radio and television stations, and governmental and non-governmental offices. The rate of production and

distribution for women-made, women-oriented news features were history-making events. And history would, in time, reveal how they fared.

The Oficina Informativa de la Mujer began and remained the most successful of the five women's feature services, in terms of output, pick-up (i.e., publication rates), and administrative stability, between 1978 and 1983. UNESCO records -- which admittedly are incomplete with regard to the various services' output and success -- are consistent in this assessment. In OIM's first year of operation, the service produced 240 articles on women in the Latin American nations, and the parent agency (IPS) reported an "almost 100%" pick-up rate (UNFPA Project Report, June 30, 1979). OIM distributed between 120 and 240 articles during each of the five years of its UNESCO funding, always with a 75 percent or higher pick-up rate by user publications. IPS distributed to major dailies, government offices, and broadcast media in 37 different nations when it established the OIM women's feature service in 1978; the number of subscriber nations steadily increased to 60 nations by 1983, more than a third of those in Latin America where the OIM operated (Giffard 1983).

There were two studies of IPS news stories' content and dissemination during the years that women's feature services operated under UNESCO funding (Hester 1979; Giffard 1983). However, neither evaluated the women's feature service operations or materials separate from IPS' other activities and products (See Giffard 1983:99).

The Depthnews Women's Service followed the OIM in terms of output and pick-up success. Producing between 100 and 120 articles

per year about women's status and concerns in the Asia-Pacific region, this service enjoyed wide distribution in the media of its own area, as well as international women's journals like Women in Action, published by the ISIS organization in Geneva (Maniquis 1990). Depthnews Women's Service benefitted particularly from a Depthnews agreement with the Asian Features Association, based in Delhi, which provided extensive distribution of materials in India's state capitals and in Thailand and Indonesia. Features have been translated into the local vernacular of these nations, carrying stories to non-English audiences (Gallagher 1981).

The IPS/OIM and Depthnews Women's Service shared another measure of success: prospects for future survival. Beginning in 1981, Yvette Abrahamson began actively working to secure U.N. funding for the feature services beyond the 1982 expiration date for UNFPA funds. At the same time, she put the feature services on notice that they must seek to become financially self-sufficient, in the event that her efforts fell through. Only the parent organizatios of the OIM and DWFS (i.e., IPS and Press Foundation of Asia) launched attempts to establish separate subscription programs and obtain additional revenues to keep their women's feature services afloat (UNFPA Project Report, June 30, 1982). The futures of these two programs will be discussed shortly.

Experiencing moderate success was the Caribbean Women's Feature Syndicate. The program had a diverse funding base from the beginning, as well as the support of the Women and Development Project (WAND) at the University of West Indies. The service distributed its 20-40 articles per year (UNFPA Project Report, December 31, 1979) to

media with diverse audiences through CANA subscribers, and to CADEC's publication Caribbean Contact. Fairly early in the service's life, staff realized that the Caribbean was not a high newspaper-reading area, that the public was more attuned to radio. This suggested expanding CWFS radio markets, which resulted in the production of about two radio programs a month through Radio Contact -- a step that exanded CWFS audiences. In addition, the staff mailed stories to a select list of groups and individuals whom they wanted to receive the stories (UNFPA Project Report, December 31, 1979; Gallagher 1981). CWFS struggled with distribution problems related to unreliable mail systems (used in the absence of telex facilities). In addition, the service found it difficult to recruit and train women to work as writers; even those with journalistic skills did not always have an appropriate perspective on the role of women in development needed for features (Gallagher 1981:153).

In spite of its efforts to adapt to the media-use habits of its regional audiences, there is evidence that CANA materials were not readily or widely used by media receiving them. Ogan and Rush (1989) cite an internal evaluation in 1982 by CWFS coordinator Lorna Gordon and a 1984 independent study by Cuthbert which indicate that print media, particularly, used few CWFS stories. CWFS stories did not reflect traditional social or news values, nor did they fit the conventional event-oriented news formats that editors expected. Cultural factors like the oral, story-telling tradition of local populations and low literacy rates also explained low uses (Rush and Ogan 1989:271-272). There is also reason to question how much CWFS's production of 20-40 stories per year significantly increased the

amount of news on women in the Caribbean region. Ogan and Rush's 1984 study of CANA found that only 1.3 percent of the agency's materials (presumably those of CWFS) concerned women (Rush and Ogan 1989:273).

The difficulties that the African Women's Feature Service and Arab States Women's Feature Service faced in trying to serve their respective regions were sometimes technical, sometimes political, sometimes even life-threatening in nature. The AWFS found obstacles distributing its features in a timely manner, as communications traveled by post through most of Africa, and the postal services were very slow (UNFPA Project Report June 30, 1982). This problem was compounded by two others: The African media were reluctant to use materials about women; and, literacy, language, and lack of involvement in public life on the part of women minimized their use of information even when it was picked up by print and broadcast media. One meeting, co-sponsored by UNESCO and the government of Gabon, held in Libreville, in February 1982, on the topic of women, development and communications, indicated that there was a need for social science research on how to truly improve the access of women to the mass media. In addition, the 60 participants recommended that social science personnel assume a more active role in helping female media personnel and media institutions to develop goals for serving women through their periodicals and programs, i.e., "to become more committed to the cause of advancing women's status, to helping development programs to support women's new roles," etc. (Abrahamson, February 1982).

The Arab States Women's Feature Service, always beset by political strife in the nations it served, struggled to produce its

share of women's features. In early 1982, what FANA director Ayer described as "the difficult internal situation in Iraq" made it impossible for the Iraqi news agency to translate its 20 plus articles (called for in the UNESCO contract) into English. Additionally, he said, the Iraqi press agencies were not showing "the least degree of cooperation with the main woman journalist," toward supplying feature material. Consequently, the journalist had to write all 20 stories herself. At the FANA headquarters in Beirut, where ASWFS was located, political instability reached life-threatening proportions when the office was bombed in 1982 and rendered dysfunctional for a period. At that point, Ayar sought permission from UNESCO to reduce the required articles from 100 to 52 for that year, and to subcontract the writing to a private Beirut news service. UNESCO's Abrahamson responded positively to such requests, but ultimately, the ASWFS produced few stories (Ayar and Abrahamson Correspondence, February-June 1982).

The United Nations agencies ended funding for the five women's feature services at the end of 1983, five years after they began. Holding to its original intent to provide seed money for the establishment of an international women's communications network, UNESCO (and the parent funding source, UNFPA) had spent nearly two full years encouraging each of the services to establish financial independence. Yvette Abrahamson had invested considerable time in soliciting non-governmental funds for the survival of the serves she had helped to create, but her efforts were unsuccessful. In the end, only two of the five -- the Inter Press Service's WFS and the Press Foundation of Asia's Depthnews Women's Service -- were able to continue.

SURVIVING PROGRAMS: IPS/WFS AND DEPTHNEWS WFS

The Depthnews Women's Service has been fully supported by its parent agency PFA since July 1983, at the rate of approximately $16,000 per year. DNWS features are produced by a writing team that includes Editor Estrella Maniquis, based at the central desk in Manila, and a network of correspondents and stringers who are mostly women. The network of writers extend into participating nations -- India, Sri Lanka, Bangladesh, Nepal, Pakistan, Malaysia, Singapore, Indonesia, Thailand, Philippines, Burma, China, South Korea, and Japan, as well as the United States and Great Britain. Writers include not only professional journalists but researchers and others in academe "whose immersion in the women's movement has given them a keen understanding of the woman issue," according to a recent DNWS report (DNWS Report, January 1990). The service produces approximately 105 features per year for distribution to 275 Depthnews subscribers (national and community newspapers) in Asia and the Middle East. At least one weekly radio service also uses the material. Features are also circulated to international women's periodicals with which DNWS has exchange arrangements (DNWS Report, January 1990). An internal evaluation by DNWS shows that 90-95 percent of the agency's stories are used by at least one newspaper, and many are used by several. Maniquis says that the establishment of "women's pages" by newspapers in the region has expanded the use of DNWS stories, which may appear in twos and threes alongside more traditional women's articles (Maniquis 1990).

DNWS's goals continue to reflect the original women's feature service goals of increasing information in the mass media on the

gender equality issues, particularly the relationship between women's status and national development; increasing women's access to social decision making; bringing public attention to women's unmet needs; and developing a journalistic perspective that will help to eliminate sexism and increase fair reporting on women (DNWS Report, January 1990).

The Inter Press Service extended its news-information services for women throughout the developing world in 1986, essentially closing the gap created by the closure of the other women's feature services. In its restructuring, IPS defined seven regions: Asia, Anglophone Africa, Francophone Africa, Latin America, the Middle East, and Europe. The OIM was renamed Servicio Especial de la Mujer Latinoamericano (SEMLA) (a closer translation of Women's Feature Service) and remained the Latin American regional center. Anita Anand, an experienced development specialist and feminist, was hired to coordinate the IPS "Women, Communications, and Development Project," within which the Women's Feature Service is operated. Anand supervised the hiring of regional directors in the field offices, as well as the selection of correspondents in the early stages. All administrative and journalistic staff are women. Training occurs at Rome headquarters, as well as in the regions, and is an ongoing proposition for IPS/WFS staff.

Anand, originally from India, and her assistant Patricia Baeza, from Guatemala, monitor the structure and substance of the features, edit stories as they arrive at Rome headquarters for distributions over the IPS wires, and regularly assess story pick-up rates. Features must conform to WFS guidelines, developed in 1986

with the input of regional directors. These guidelines require that stories focus on women's experiences and accomplishments as these relate to economic, political, or cultural developments within nations. They also stress women's voice: giving both ordinary women and women in leadership roles a place to speak about the conditions and policies that affect them.

A recent study of IPS/WFS by Byerly (1990) evaluated agency story output, pick-up, and content for the months of March, April, and May 1986, 1987, 1988 and 1989. The study, based on a total of 460 stories for the 12-months examined, reveals that since 1986, when IPS established its seven-regions, annual feature production has increased approximately 300 percent, from an average of 19 stories per month in 1986 to 53 per month in 1989. Pick-up percentage has remained constant, at approximately 60 percent of the stories distributed by wire and (in Africa) mail. However, in terms of numbers, there are presently many more stories finding their way into the media each year. Sixty percent of the articles, for the months examined, were published by major dailies in Latin American capitals, with Jornada (Bolivia), Excelsior (Mexico), and Los Andes (Venezuela) each publishing between two and eight articles per month. European weeklies (particularly in Finland) used 19 percent of stories. Asian dailies and weeklies used 10 percent. And, lowest pick-up was in Africa (6%), the Caribbean (3%), and Arab Nations (0%). The U.S., where IPS/WFS has not yet begun to market, used only 4 percent of the total stories.

These rates of use reflect IPS' services' patterns of years past, when the original UNESCO-funded women's feature services

operated. The Latin American region, where DIM built a strong user base earlier and where IPS' own foothold has always been strong, continues to outdistance other regions of the world in its use of IPS/WFS stories. Africa, the Middle East, and Caribbean regions continue to lag behind. The northern European nations, most notably Finland, where no fewer than 23 periodicals presently use IPS/WFS materials, continue to show an interest in publishing news about and for women (see page 3). The lack of a tracking system has made it impossible for either the IPS/WFS staff or independent researchers, who have evaluated the IPS agency, to determine the extent to which materials are used by broadcast media. In the Third World, where radios and televisions are able to reach low and non-reading audiences, this would surely be useful to know.

The IPS/WFS stories closely follow guidelines established by Anand and regional staff. A content analysis of 106 stories, selected from the total 460 distributed in the 12 months assessed by the study, revealed that 95 percent of the stories concerned women and national development processes; nearly a third of those focused on changing laws and policies to benefit women. Ninety percent of the stories identified not only a problem or issue related to women and development, but also a solution (i.e., what was being done to address it). Eighty three percent of the stories used women as the primary source of information, with the most common roles being government and non-government administrators (28%), feminist/women's leaders (11%), and scientists/researchers (10%). Women holding other positions (e.g., mothers, 9%; wife, 6%; teacher, 6%) accounted for the remainder of the sources (Byerly 1990).

Texts of the news features reveal the wide range of issues, views, aspirations, classes, cultures, and concerns that exist among women in the Third World. In following IPS/WFS journalistic guidelines (see above), stories seek to explain women's relationship to national problems and development processes, and they seek to do this through the voices of women affected.

One April 1989 story datelined Nepal inspects the problem of female literacy (only 18% compared to 52% for males), a centerpost of women's oppression in a "region where most parents consider it unfortunate to have daughters." The story of five-year old Vishnumaya is a metaphor for other Nepalese females: young daughters are taken from school to help their mothers with other children and home chores; adolescent girls are put to work in factories or in private homes as maids; early marriage and motherhood are inevitable. But a new set of government policies, aimed at improving female welfare, features the opening of 50 adult learning centers around the nation and primary education for girls. The program needs widespread recruitment and publicity, activists charge. Still, they recognize the importance of this step toward education for this nation's women.

A March 1988 story from Colombo, Sri Lanka probed women's organized women's resistance to the five-year old civil war. The mothers' front had "waged a unique and controversial campaign for peace" through a death fast aimed at securing a cease fire in the town of Batticaloa. The Indian government, at war here with the Tamil people, had appealed to the mothers' front to give up their fast and reduce tension in the area. Instead, the mothers threatened to add more members, and local women had begun to pledge their solidarity.

David, the mother whose story became the vehicle for this tale of women's negotiation with men's wars, appeared to be dying. Another mother member believed her death would "make the two sides sit up and take notice."

Some stories point out women's progress. Another March 1988 story from Kingston, Jamaica, concerned with women's situation across the nation on International Women's Day, began optimistically, with the Prime Minister claiming "the next century belongs to the women." Edward Seaga boasted the number of women in high level posts in his administration. One of these, Acting Social Secutiry and Consumer Affairs Minister Enid Bennett, and others spoke at this special luncheon, calling for an end to violence and discrimination against women and legislation "recognizing the role of women and dealing with their social conditions." Recent upsurges in rape and employment practices were current issues. The latter had brought 2,000 women into the streets the previous week to announce their formation of a labor union council to negotiate their own interests in local factories. Bennett called for women to show "more love, care, respect and support" to each other and observed that "the total development of a nation was reflected in the quality of life enjoyed by women."

Interviews with Anand and the IPS/WFS staff in Rome in October-November 1989 indicate that the service's future funding looks promising. A WFS/IPS "Dossier Service," which is a data-base formed by an annotated index of stories published by the service since 1987, and run with the assistance of IPS' Daniela Vatter, is beginning to sell among subscribers, particularly public agencies. An active marketing of news features by both Anand, who travels to the seven

regions periodically, and the regional directors, has already begun to show signs of success (as figures just reported indicate). In addition, Anand continues to write grants to both governmental and non-governmental sources for funds.

These efforts have supplemented the financial and administrative support that Inter Press Service assumed for women's news, when UNESCO funding for women's feature services ended in 1983. IPS' own financial circumstances are often uncertain, as the agency is dependent on the payment schedules of the numerous nations, subscribers, and organizations that support it. IPS has been able to maintain a number of contracts, some of them from the U.N. system, to support the Women's Feature Service.

Financial and administrative relationships between the IPS and Women's Feature Service are presently in a state of renegotiation, however. As called for in the WFS guidelines, the program aims to become autonomous by fall 1990, when Anand plans to relocate the WFS in New Delhi. When this occurs, the independent Women's Feature Service will be the only international women's news agency based in the developing world (Byerly 1990).

IMPACT ON WORLD NEWS

The women's feature services have contributed significantly in at several ways to women's place in world news.

1. International news flow. First, the feature services have increased news and information about and for women available in the developing world they were intended to serve, as well as in many developed nations. Records indicate that approximately 2,500 news

features were distributed through the five women's feature services by the time UNFPA/UNESCO project funding ended in 1983. In the seven years since, Depthnews Women's Service and IPS Women's Feature Service have contributed an additional 3,500-4,000 stories to world news flow. Records of story pick-up is incomplete, but what we have indicates that the media in Latin America and Asia are the most likely to use women's feature materials, with the Caribbean, Middle East, and African states least likely to do so. Recent research also suggests that while the women's feature stories concern women in the developing nations, the media in industrialized nations are also interested in carrying the stories. While further research is needed to determine who uses published stories, and to what end, there is sufficient evidence to show that there is a general demand world-wide.

2. Qualitative contributions. The women's feature services have operated as women-controlled newsmaking enterprises within more traditional news agencies managed by men. While further research is needed to determine whether and how their presence has altered organizational structures and values in the parent agencies, we can make some observations about what their content has contributed to the subscribing media that publish (or otherwise use) their news features.

For one thing, news features have brought Third World women's perspectives into world news by making women's experiences, opinions, and goals the central focus of stories. These elements are presented within the framework of women's relationship to Third World societies and development processes. The women's feature services have established (and thereby modeled) the journalistic means for accomplishing this by adopting guidelines and routines for

systematically identifying and developing topics and events of interest to women.

One of the chief means of including women's perspective has been through using women as sources of information. Looking to women with recognized professional expertise, women in official government or non-governmental agency positions, feminist and other leaders, domestic workers, agricultural workers, and women in other ordinary social roles, the women's feature services have increased the range of women's voices that speak to audiences. IPS/WFS' Anita Anand reflects that when she first heard about the women's feature services in the late 1970s, she was instantly convinced of their importance. Third World women writing about their own experiences from their own point of view was a missing link in both local and world news, she says (Anand 1989). The women's feature services opened a wedge in a closed-system, providing access for Third World women of diverse class, ethnic affiliation, and interests to speak to each other and their societies through mass media systems. Because the industrial world -- both its women's publications and some mainstream media -- are also picking up stories, these women's voices are being heard globally. This broadens the spectrum of concerns, needs, opinions, and possible solutions to women's problems that are being heard around the world. This in turn serves both distinguish women's uniqueness from each other as well as to internationize the shared concerns regarding rights, status and advancement.

Greater visibility of woman-oriented news and information through conventional print and broadcast media confers status on women's concerns and experiences, and it reflects more systematically

the ways in which women contribute to the dynamic processes of social change. The development orientation of the articles, furthermore, enhances the possibilities for women to locate their own niches in local and national processes of change in nations where women's status has met been slowest to advance.

This enhances the possibility that that the news media can be pressed into the service of women, defining their social and political goals, following movement successes and failures, giving credit to movement leaders and members, and interpreting women's advancements for a given society as a whole.

3. Training of women journalists. The women's feature services have helped to expand the pool of women journalists trained to write both development news and news from a women's perspective. There are no records to suggest the numbers of women journalists who came to their journalistic profession through this project. This is a potentially rich area for research. The training and advancement of women journalists through this project complements those trained by other U.N. projects (i.e., the International Program for Development Communication) and non-governmental programs in the Third World.

4. A record of women's history. Historian Gerda Lerner (1986) distinguishes between women's history and Women's History. The first represents the real but unrecorded ways in which women have contributed to the making of civilizations around the world. The second, a more recent endeavor, represents what has been recorded of women's equally important role (vis-a-vis that of men's) in historical processes. Women's feature services contribute in a significant way to the second by providing accounts of the problems, needs,

accomplishments, views, and other experiences of both ordinary and extraordinary women, poor women and rich women, and women of varying degrees of a gendered political consciousness. In totality thse accounts increase the breadth and depth of the available information about the historical experiences of Third World women, whose voices are most often marginalized or absent from the literature (Rhodes 1989).

In conclusion, I would add only that the two remaining women's feature services are still very much in a developmental stage. Organizationally and substantively, they will continue to evolve and to seek their place in the larger scheme of world newsmaking. Their progress bears watching in that they represent, to date, the most consistent effort by women in developing nations to gain access to the mainstream international news media.

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ABSTRACT

The Challenge of Political "Spin Medicine" to the Traditional Concept of Television News: A Case Study of the 1988 Campaign

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Media professionals, especially those involved in television news, continue to study the lessons of the 1988 presidential campaign in hopes that coverage of the next campaign will improve. Some of the questions that are still searching for an answer are: Do "spin doctors" have too much power in determining television's news agenda? How far can a reporter go in questioning the veracity of campaign slogans and "news events" before risking his/her impartiality?

In order to take a more serious look at campaign coverage balance, an analysis was made of the network coverage of the three major Boston-centered events of the 1988 campaign: The Boston harbor story, the Boston Police Department's endorsement of Bush and the Bush exploitation of Boston Herald's "What a Mess" front page headline. A quantitative and qualitative analysis of the video and audio portions of all relevant news stories was made and special attention was paid to the treatment of Bush "points" and Dukakis "counterpoints."

The findings show that the Bush campaign received considerably more air time than the Dukakis campaign (27% more video/audio time and 55% video-only time) thus seemingly giving Bush a better chance at scoring his "points." Counterpoints were used haphazardly. Dukakis "lost" in the coverage of almost all networks and across all events. ABC was the most "hospitable" network to Bush with CBS second and NBC third.

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The Challenge of Political "Spin Medicine" to the Traditional Concept of Television News: A Case Study of the 1988 Campaign

Introduction

Recent presidential campaigns have become notorious not only for their vicious character but also for challenging the press's traditional news values and practices as well as the intelligence and patience of the American public.

Mass communication researchers in the last 20 years have successfully addressed many of the aspects of this media-politics relationship and focused attention on a variety of mass communication phenomena that shed light into public opinion formation and voter behavior.

The McCombs-Shaw pioneer studies of the 1970s, for example, started a trend by identifying the press's "agenda setting function,"[1] which saw a strong relationship between "the emphasis placed on different campaign issues by the media...and the judgments of the voters as to the salience and importance of various campaign topics."[2]

Other notable research contributors were Iyengar, Peters and Kinder, who identified the "priming" function of the media's decision-making process;[3] G.R. Funkhouser, who dissected the relationship between media content and public opinion poll results;[4] McCombs, Gilbert and Eyal, who studied presidential addresses and media coverage[5] and sociologists Kurt and Gladys

Lang, who addressed the subject of media presentation of issues the issues' perception by media consumers.[6]

So far, however, most of the research focus has been on the media-to-the-public relationship, while relatively little attention has been paid to the source-to-media relationship of the mass communication equation. Few researchers, for example, concentrated as B. Westley did on the question of how the media themselves were influenced in setting their agenda.[7] Although Westley observed that special-interest and pressure groups do help shape the media news agenda, it has become obvious in recent years that news "sources" easily can become "newsworthy" without having to resort to the outdated activities of a "pressure group." Such newsworthiness seems to be achievable today simply through the articulate, imaginative and unabashed use of "public relations" techniques.

Such activities, perhaps, can easily be viewed as an updated, popularity driven, technologically advanced, version of what Daniel Boorstin almost 30 years ago in The Image called "pseudo-events."[8] Pseudo-events, Boorstin said, are non-spontaneous activities "planted primarily...for the immediate purpose of being reported," whose "relation to the underlying reality of the situation is ambiguous" and whose intention is "to be a self-fulfilling prophecy."

Political campaigns often are outstanding examples of the creation and utilization of the art of the pseudo-event and the 1988 presidential campaign seemed to be better than most in this respect. The challenge that pseudo-events (from "spin doctor" commentaries to opinion polls and candidate image crafting/correcting) present to the news media was the motivation for this study.

More specifically, the study will focus on how the three network news teams differed in their definition of news and how their news judgment matched the "news" objectives set by the 1988 campaign teams.

Some of the major questions on which the study will focus are: Did the network journalists have a news/issues agenda they expected the candidates to address during the campaign or did they cover the candidates' messages as presented, unchallenged. As candidates went about the country throwing vitriolic accusations against each other, did the press attempt to verify any of the accusations or did it challenge the accusers? Should it have tried to? Or might either course of action have created the perception of antagonism toward the candidate, thus endangering the medium's credibility? If so, did the press then simply transmit the information provided by the candidates' "handlers" and moved on to the next campaign stop?

The discussion about this issue, especially in view of the unusual degree of success of the media communication methods of the Bush campaign, is still raging across the media professions and may go a long way in creating a new set of "game rules" and in redefining our traditional news values for years to come.

In order to address one part of this very large issue, this study will concentrate on the network news coverage of three events that political observers have considered instrumental in the Bush campaign's success--a success, which, by the way, was so overwhelming that it raised charges of media manipulation/exploitation. The events are the three "raids" on Boston: The Boston harbor pollution event that in effect challenged the Dukakis environmental record; the Boston Police Department endorsement of Bush that in effect started the crucial "soft-on-crime" debate, and Bush's panegyrical use, four days before the election, of the Boston Herald and its 76-point headline "What a Mess!" ridiculing Massachusetts' poor economic condition. Many have considered this "prop" to have been the "last nail in the coffin" of the Dukakis campaign.

Although, obviously, there are no formulae for what is "objective," "fair," or even "balanced" coverage, it was felt that, at least in relative terms, a comparison of the way each network covered the same story might yield interesting and valid results about news selection and play, especially in view of pre-

campaign allegations that some network coverage already was showing its "liberal" political color.

Research Questions and Methodology

Indexes and videotapes of the ABC, CBS and NBC early evening newscasts of Sept. 1 (Boston harbor story), Sept. 22 (BPD endorsement story) and Nov. 4 (Boston Herald story) were obtained from the Vanderbilt Television News Archive and analyzed.

The analysis was both quantitative and qualitative. Quantitatively, stop-watch measurements were taken of the length of time campaign video and campaign video and audio was on. Video-only segments included shots of crowds cheering, candidates arriving, etc., while the reporter voiced over the tape. Video/audio segments were those depicting the candidate, a member of his staff or an "expert" speaking in or along with the video.

Qualitatively, and since these three events depicted Bush on the attack, scoring points, a list of potential "counterpoints" (possible Dukakis responses) was created from what the three networks eventually used in their own coverage (i.e. federal culpability in the Boston harbor cleanup delay, Dukakis inheriting the prison furlough program from his Republican predecessor, the Herald's endorsement of Bush in a front page

editorial just a few days before the headline in question appeared, etc.). In order to see if the networks would go beyond what was being given them in search of balance, each network's coverage was "tested" against the list of 12 possible counterpoints with special attention paid to the source of the counterpoints--the candidate himself, a member of his campaign staff, an "expert" or the reporter.

In the examination of the text and visual/audio elements of each story, a segment was considered to be "pro-Bush" or "pro-Dukakis" if the video and audio or video only reporting of his campaign event (that is, what his campaign defined and the media covered as the news event) was on the screen longer than his opponent's. Presence of at least half of the possible Dukakis counterpoints in a segment, made it a "pro-Dukakis" story while use of fewer counterpoints made it a "pro-Bush" story because in all three instances he was depicted as the "aggressor" who was scoring "points."

The research hypotheses were:

1. Bush would get more time (both in video and audio and video only) in the news across all three events if only for his position as a sitting vice president;

2. a. The Bush campaign's "best" showing would be the Boston

harbor story because of its i. visual strength, ii. its being timed so soon after the Republican convention when both the public and the media were eager to see what sort of campaigner Bush was going to be and iii. its audacious nature, that is, coming to Dukakis's turf;

b. The Boston Police Department endorsement story would yield an almost "even" coverage because the Dukakis campaign was able to produce its own police officers associations' endorsements the same day;

c. The Herald story would yield another strong showing for Bush because of its timeliness and its visual potential. Of course, all three incidents possessed an inherent pro-Bush hue because of their very geographical origin--Boston, his opponent's city where he had nothing to lose, in case anything backfired, and everything to gain.

3. a. Based on CBS's record with the Reagan administration in general and Bush in particular, it was hypothesized that CBS would yield coverage that would be more favorable to Dukakis than to Bush;

b. ABC would yield coverage that would be more favorable to Bush than to Dukakis and

c. NBC would yield coverage generally favorable to Bush but to a lesser degree than ABC's, thus enabling the network to be closer to "even" coverage than its two rivals.

Findings

Table 1, in absolute figures, and Table 2, in percentages, show that of the 36.16 minutes of coverage these events received, Bush averaged 27% more video/audio coverage than Dukakis--17.37% or 6.28 minutes and 12.68% or 4.58 minutes respectively. The Bush campaign had a much wider "lead" in the three networks' video-only coverage where it outdistanced Dukakis' coverage by almost 55%--34.93% or 12.63 minutes and 15.80% or 5.71 minutes respectively. The first hypothesis therefore was confirmed.

Also confirmed was hypothesis 2a, which had predicted that the Boston harbor would yield strong pro-Bush coverage. There were almost 66% more video/audio Bush minutes than Dukakis minutes and almost 86% more video-only Bush minutes than Dukakis minutes (Table 2). Although all the potential counterpoints were utilized, they mainly appeared in only one network (ABC) and almost all of them came from the reporters and not the candidate, a staffer or an "expert" (Table 3).

In the harbor story, the most "balanced" showing of video/audio minutes was found in NBC's coverage (only about 5% difference existed between the two sides with Dukakis having the "advantage") and the least "balanced" was found in CBS's coverage (74% difference existed between the two sides with Bush in the "lead"). A similar pattern was found in the video-only coverage distribution (Table 2).

Hypothesis 2b was confirmed, too--the two campaign teams managed to receive endorsements by several police officers' associations in very visual fashions and therefore the coverage was relatively "even." Only an approximately 10% difference was found to exist in the video/audio segments of the coverage of the two sides and about 23% between the video-only segments (Table 2).

There was also a relatively "even" distribution of points/counterpoints across the three networks (Table 3). The most "balanced" video/audio coverage was given by CBS (only a 2% difference was found to exist between the two camps with Dukakis "ahead") and the least "balanced" was found in ABC's coverage (a 30% difference with Dukakis "ahead"). The video-only pattern was the same except that ABC's "imbalance" (33% difference between the two camps) was "tilted" toward Bush (Table 2).

The Boston Herald coverage did not yield an undisputed strong Bush showing and therefore hypothesis 2c was not confirmed. In fact, the Dukakis part of the story received 9% more video/audio time across the networks than did Bush's (Table 2). The latter's version of the story, however, dominated the video-only time by 2:1. CBS and NBC vied for the most "balanced" video/audio coverage of this story by yielding 10% and 12% differences between the two sides respectively (CBS in "favor" of Dukakis and NBC in "favor" of Bush). ABC yielded the "least balanced"

coverage by favoring the Bush campaign by 94% more than Dukakis's. Dukakis counterpoints received no play by ABC on this story, but they were used to various degrees by the other two networks (Table 3).

Hypothesis 3a , which had predicted a "pro-Dukakis" coverage by CBS, was not confirmed. The Bush campaign received about 30% more video/audio coverage time than Dukakis's (18.17% to 12.86%) and about 57% more video-only coverage time (32.86% to 14.18%) (Table 2). Furthermore, CBS's coverage used only half of the Dukakis counterpoints in its broadcasts of these three stories (Table 3).

ABC's pro-Bush coverage did confirm hypothesis 3b. The network gave about 41% more video/audio coverage time to Bush than it did to Dukakis (23.89% to 14.06%) and about 62% more video-only coverage time to Bush than to Dukakis (41.80% to 15.66%) (Table 2). ABC, however, used in its stories more of the Dukakis counterpoints than any of its rivals. This showing was slightly tarnished by the network's "failure" to utilize any of the counterpoints in the Herald story (Table 3).

Hypothesis 3c was confirmed as NBC did manage to stay closer to the "evenness" concept (in both video/audio and video-only) although it did give more video/audio time to Dukakis and not to Bush as hypothesized. In any case, the difference between the two video/audio segments was less than 10% (11.12% for Dukakis and

10.06% for Bush) and the difference between the two video-only segments was about 41% (30.14 for Bush and 17.57 for Dukakis) (Table 2). NBC's general lack of counterpoints (it used only one third of those listed) is perhaps mitigated by the fact that it was the only network that had Dukakis himself delivering his own counterpoints in two of the three stories examined. No other network had him presenting any of the counterpoints listed (Table 3).

In general, the most "hospitable" network to the Bush campaign was ABC, with CBS second and NBC third--a pattern that held true in both the video/audio and video-only categories (Table 2). Dukakis "lost" in the video/audio coverage of two of the three networks and in the video-only coverage of all three networks. As far as the individual event coverage was concerned, Dukakis "won" only in the video/audio coverage time of the Boston Herald story.

Discussion and Conclusions

If the networks had to meet the FCC "equal time" test in the coverage of these three stories, they would not have passed it. The dominance of the Bush campaign's exposure through the networks' coverage (in all three networks and in all three stories) was simply overwhelming. This has to be partly attributed to the nature of these stories in which he was the "aggressor," main actor and, in effect, stage director. It is

nevertheless disconcerting.

Furthermore, it should be pointed out that this dominance may say less about network "bias" and more about the Bush campaign's knack for attractive television "news" packages (from text to visuals), the worthiness of his message and/or the ineptness of the Dukakis campaign.

It seems as though the "success" of the Boston harbor story as a coverable "news" item set the tenor for the coverage of the rest of the campaign, from which the Dukakis camp never really recovered, in spite of a very strong showing in the other two stories.

It is interesting, however, that with time the Bush-Dukakis difference in the video/audio category (the strongest of the two categories examined here) became smaller (from 66% on Sept. 1, to 10% on Sept. 22 to 9% on Nov. 4), while the opposite was true of the video-only category difference, which increased with time (from 8.6% on Sept. 1 to 26% of Sept. 22 to 50% on Nov. 4). Coupled with the counterpoints sources, this finding may suggest that more time was given to video/audio Dukakis segments as the campaign progressed (either because of Dukakis campaign improvements, network coverage shift due to public mood swing or loss of the Bush campaign luster), while at the same time increasingly more attention was paid to the Bush video segment.

In either case, the Bush campaign never lost its visual advantage over the Dukakis campaign, regardless of the massages being presented by the candidates or any changes in momentum.

CBS's strong showing "for" Bush was a surprise, but that might have been the result of intimidation of the network after the January 1988 Bush-Rather on-air confrontation or just fear of a public or advertiser backlash against it if it were perceived as (again) the old liberal news team giving "better" coverage to the only perceived liberal in the race.

The extend of the "pro-Bush" coverage time by ABC was countered by its doing second, explanatory stories on two of the three topics studied (harbor pollution and the Massachusetts furlough program) and by its reporters' utilization (although in passing) of most of the listed Dukakis counterpoints. It was a unique search for balance among the networks.

One of the great surprises of the study was that in spite of their huge technological arsenals, their vast personnel resources as well as their ubiquitous presence (especially through the use of affiliates), the network news teams seemed to have made no serious effort to get Dukakis himself or his staff to counter the points raised by the Bush campaign. Only NBC managed to get Dukakis to respond in two of the three stories examined. This might very well have been the fault of the Dukakis campaign, but

it does not appear to be so in view of NBC's "success."

This simple "void," however, might perhaps be reflective of a larger question. Did the Dukakis team fail to devise and practice a media-friendly (visually exciting, textually articulate, easily accessible) campaign? Or, in case of "unfair" Bush attacks, did the Dukakis people expect that the press would "act as a referee, policing the agenda and penalizing the Republican for his tactics" as Jack Corrigan, Dukakis campaign operations director, told the Boston Globe a week after the campaign ended?[9]

The agony of those who covered this campaign (both print and broadcast reporters/editors) centers around that question. The feeling that somehow they were manipulated has been a topic of many a professional debate but the answers are not easy. How far can a reporter go to challenge the veracity or fairness of a carefully crafted but perhaps misleading campaign slogan, accusation or commercial without risking his/her perceived impartiality? How much can a reporter challenge what is given him/her by the campaign "handlers" without risking his/her medium's reputation and eventual public acceptance? In the era of ratings and cable wars this makes broadcast journalists particularly vulnerable.

But perhaps this very vulnerabilty and the undeniable success of

well orchestrated media events, from Michael Deaver's White House policy of "manipulation by inundation" ("You give them their story....hand them a well-packaged, premasticated story in the format they want, they'll go away.")[10] to Roger Ailes's spectacular visual symbols of the 1988 campaign, indicate that the procees needs to be studied and revamped.

The drama, penetration and perceived credibilty of televison news foster an environment that lends itself to political hit-and-run artists who might exploit the system and diminish its principles. It is incumbent, therefore, upon the profession in general, not just television journalists, to become more sensitized to the changing nature of the "game" and develop new rules that would nurture the creation of new news-source strategies, accuracy tests and balance, especially in these hotly contested situations where the "truth" has so many potential faces.

To accept as newsworthy and coverable only what is being fed to the media by those who have an interest in influencing them does not speak well either of our press system or our democracy. Jeff Granlick, former executive producer of ABC's World News Tonight, said "It's my job to take the news as they choose to give it to us and then, in the amount of time that's available, put it into context...The evening newscast is not supposed to be the watchdog on the government. It never was. It never will be."[11] If that is the way of the future, journalists are abandoning one of the

crucial responsibilities handed down to them by our forefathers who crafted the First Amendment to ensure that the American press, as a special guardian of our democratic institutions, is free to cover the political process without fear of retribution. If that kind of thinking becomes, because of political or economic considerations, the rule and not the exception, then we should indeed prepare to mourn what many professionals are already calling the "death of news."[12]

Endnotes

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8. D. Boorstin, The Image (New York: Atheneum, 1985), pp. 11-12.

9. Boston Globe, Nov. 13, 1988, p. B12.

10. M. Hertsgaard, On Bended Knee (New York: Farrar Straus Giroux, 1988), p. 52.

11. Ibid., pp. 62-63.

12. Ellen Hume, speech to the New England Newspaper Association Annual Meeting and Winter Convention, March 23, 1989, Boston; Louis Conrad, Boston Globe, August 17, 1988, p. A19.

Table 1

Actual Time Devoted to Each Segment of the Story Covered
(in absolute figures of seconds)

	Harbor Story	Police Story	Herald Story
	Broadcast Rank: 2	1	1
	Length: 4' 10"	5' 20"	4'
	Date: Sept. 1	Sept. 22	Nov. 4

ABC	BUSH		DUKE		BUSH		DUKE		BUSH		DUKE	
SR	V/A	V	V/A	V	V/A	V	V/A	V	V/A	V	V/A	V
1	60	130	0	0	21	85	0	34	36	81	41	89
2	0	0	0	0	0	0	0	0	0	0	3	0
3	20	0	23	0	30	0	36	0	0	0	0	0
	Rank: 4				4				2			
CBS	Length: 4' 10"				3' 20"				4' 30"			
1	33	45	0	5	25	80	20	85	40	119	26	70
2	0	0	0	0	0	0	0	0	0	0	0	0
3	12	0	12	0	19	0	26	0	0	0	0	0
	Rank: 6				2				2			
NBC	Length: 2' 40"				2' 30"				5' 50"			
1	12	25	13	23	5	65	9	58	25	140	45	75
2	0	0	0	0	0	0	0	0	14	0	0	0
3	0	0	0	0	19	0	17	0	0	0	0	0

Total Length of Story: 660" 670" 840"

V/A=video and audio, V=Video only
SR=Source of Audio: Source 1=Candidate, Source 2=Campaign staff, Source 3="Expert"

Table 2

Percentage of Campaign Story Time Devoted to Each Candidate

	Harbor Story				Police Story				Herald Story			
	BUSH		DUKE		BUSH		DUKE		BUSH		DUKE	
	V/A	V	V/A	V	V/A	V	V/A	V	V/A	V	V/A	V
ABC	12.1	19.6	3.40	0	7.57	12.6	5.37	5.07	4.20	9.64	5.29	10.6
CBS	6.80	6.80	1.80	0.75	6.61	11.9	6.78	12.6	4.76	14.2	4.28	0.83
NBC	1.80	3.78	1.90	3.48	3.57	9.70	3.87	8.65	4.69	16.7	5.35	8.92
Totals	20.72	30.18	7.10	4.23	17.75	34.20	16.02	26.32	13.65	40.46	14.92	20.34

Totals per Network (all stories)
Bush/Dukakis Ratios (%)

	V/A	V	V/A	V
ABC	23.89 / 14.06	41.80 / 15.66	= 1.69	2.66
CBS	18.17 / 12.86	32.86 / 14.18	= 1.41	2.31
NBC	10.06 / 11.12	30.14 / 17.57	= .90	1.71

V/A= video and audio, V= Video only

Table 3

Counterpoint Distribution
(Video and audio only)

Harbor Story	ABC	CBS	NBC
Federal Culpability	4,3	3,4,4	1,4
Rep. govr. waivers requested, too	4		
Pollution preceded D.	4,4		
Treatment uncertainty, added delays	4		
BPD Endorsement Story			
BPD regularly endorses Rep.	4	4	4
Police unions endorsing D. have 15,000 members, BPD 1,500		4	
MA has lowest crime rates of any industrial state	3	3,4	
Furloughs were instituted by Rep. govr./D. inherited prgrm.	4		1
40+ States have similar furlough programs	4		
Herald/MA Deficit Story			
Herald had just endorsed B.		4	
MA deficit vs. national deficit		4	4
"CATEGORY USED" TOTALS*	8	6	4

1=Candidate, 2=Staff, 3="Expert", 4=Reporter
* Not the number of references but the number of times category was used.

THE EVILS CONGRESS HAS A RIGHT TO PREVENT? : THE MILLIAN PRINCIPLE AND THE ESPIONAGE ACT CASES

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THE EVILS CONGRESS HAS A RIGHT TO PREVENT? : THE MILLIAN PRINCIPLE AND THE ESPIONAGE ACT CASES

Since the early part of this century, judges, lawyers, politicians, and scholars have been trying to articulate a theory of the first amendment protection of free speech that will both protect the needs of a changing and diverse society as well as the rights of individuals. This delicate balancing of sometimes opposing forces has been accomplished--or tried--in many ways. Some theorists have argued that the overriding concern should be for the rights of individuals to say and write what they wish. Others argue for that same concern, but base it on the presumption that to protect the individual's right to speak is to protect democracy at its most basic level. This assures our opportunity to hear various sides of issues--the "marketplace" theory of free speech. Still other theorists argue for free speech as an aspect of individual liberty. In these theories, liberty is seen as a natural law, not based on a political principle but instead on the rights we have as human beings.

In outlining their arguments, first amendment theorists typically set up categories of speech to help define what is and is not protected by the first amendment. Sometimes the crucial line is drawn between political and non-political speech, or public and private speech. Some theories distinguish between speech and action, while others argue that speech (in whatever form) is protected absolutely by the first amendment, and other rights must give way when they conflict. Some give speech a "preferred position," and some argue that speech is only one of many rights that must be balanced according to the particular situation.

What all these theories have in common is that none of them can work in all instances. The protection of speech has too many variables for one theory to provide an answer in every case. Political speech, symbolic speech, pornography, everyday private speech, sedition, libel, obscenity--each of these forms of expression has a

different level of protection, a level that has changed as the composition of the Supreme Court and the development of society have changed. And each causes heated debate about the level of first amendment protection it should receive.

What about speech during wartime, particularly speech against the war or the government engaged in the war? Is that protected? Most liberals* would say yes, anti-war speech should be at least somewhat protected. But speech during time of war causes dilemmas that speech during other times does not. For example, does the government have an obligation to protect itself and its people against speech that could potentially overthrow the government? In other words, does the Constitution protect the very speech that could bring about its demise? Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis, in several cases during and after World War I, articulated the "clear and present danger" test in an attempt to provide a guide for decisions in speech cases brought about by the war. Interference in the right to free speech could be allowed only in the most urgent situations, when the fate of the country lay in the balance, they said. The danger, Holmes explained, had not only to be severe, it had to be immediate, with no hope of time for rebuttal. Though the test could be applied to nonwar situations, Holmes argued that it is only during war that situations so grave that speech must be prohibited tend to exist. "Clear and present danger" was meant to protect speech by supplying a test of when government intervention in speech is constitutionally permissible.

But the "clear and present danger" test was not effective in protecting speech that U.S. citizens can agree, looking back, should have been protected. Individuals were sent to prison for extolling socialism, for angrily denouncing U.S. policies in Russia (with whom we were not at war), and for general anti-war efforts. Though he is

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* By "liberal" here I mean not liberal in the common-use sense, as in liberal and conservative politicians, but liberal in the traditional sense, in which individual rights and liberties are highly valued.

known for his support of free expression. Holmes first put forth his doctrine in the Court opinion upholding the conviction of two men who had circulated leaflets denouncing recruitment. Holmes and Brandeis went on to write the opinions in four more of the nine cases affirming convictions for anti-war speech during World War I, and dissented in only three cases. Though it was a major development in first amendment theory, in none of the nine original cases was the "clear and present danger" test used to overturn a conviction.

What theory would have been better suited to overturn those convictions? Perhaps the "Millian Principle" as outlined by philosopher and first amendment theorist Thomas Scanlon. The Millian Principle, which is based on audience rights rather than speakers' rights, allows government intervention in speech rights only in two cases: first, if the speech causes listeners or readers to "have false beliefs," and second, if it causes them to perform harmful acts based directly on the words heard or read. While the Millian Principle is not an all-encompassing theory of the first amendment, it is absolute within its bounds and it does provide a basis for deciding when government intervention in speech is appropriate. This paper, then, attempts to answer the following questions: If the justices had used the Millian Principle in the nine World War I cases, would they have overturned the convictions? And would the Millian Principle in fact be a better test of limitations on government intervention in free speech during wartime? In so doing, the paper first explores Scanlon's Millian Principle, which is an extension of John Stuart Mill's and Alexander Meiklejohn's theories. The major section of the paper is devoted to an examination of the nine free speech cases that came before the Supreme Court during 1919 and 1920, the so-called "Espionage Act" cases, with special emphasis is given to four of those cases. It examines the holdings in the cases, and how and why the justices reached their decisions. It explores the development of the "clear and present danger" doctrine and how that

doctrine functioned. Finally, it applies the Millian Principle to the cases, to see if in fact this principle would have provided better protection to anti-war speech.

The Millian Principle

Liberals have delineated varying theories of the first amendment, each marking as ideal some point on a continuum at which government intervention is acceptable. Some, like Mill and Meiklejohn, D.F.B. Tucker suggests, espouse a functionalist theory of freedom of expression, in the sense that a right of free expression for them is a consequence of a larger moral theory. That is, for Mill and Meiklejohn, free speech is to be valued, but not primarily as an individual right. Instead, Tucker writes, for them "liberty must be justified by its consequences and that what is important is not any abstract right of a speaker but the interests of his or her audience" (Tucker, p. 24). Others, like Rawls, explains Tucker, argue for a rights-based theory of expression, in which the "existence of [the right places] limits on the ways in which governmental authorities may go about pursuing policy objectives" (Tucker, p. 1). For Rawls' and other rights-based theories, it is the existence of the individual right, not the larger good served by the right, that is important. Scanlon allies himself with Mill and Meiklejohn, rather than Rawls, and attempts to use their theories as a basis for what he calls the Millian Principle. This principle places specific limitations on government intervention in speech, based not on the individual's right to speak, but on the audience's need to hear. In emphasizing the audience over the individual speaker, Scanlon is negating what he sees as the "irrationality" of most doctrines of freedom of expression.

This irrationality, Scanlon maintains, is an integral part of most theories of freedom of expression, and comes from the apparent conflict of governmental authority and individual rights or autonomy. In most theories the government is seen

as having an obligation to its citizens "to decide when the threat of certain harms is great enough to warrant legal action, and when it is, to make laws adequate to meet that threat (Thus, Holmes' famous reference to 'substantive evils that Congress has a right to prevent.')" (Scanlon, 1972, p. 217). On one hand, governments have a duty to protect citizens, yet on the other, strong doctrines of free expression protect certain acts even when those acts otherwise would be unlawful.

The attempt to answer this irrationality marks most defenses of free expression. The typical defense, Scanlon says, carefully defines the categories of protected expression and explains the nature of these categories. Most defenses are consequentialist, that is, they protect certain types of expression because the protection provides for better overall consequences than would the prohibition of that expression. This often takes the form of balancing, as in many free speech cases. What any theory must do, then, Scanlon says, is to acknowledge the extent to which the theory depends upon balancing interests for its protection of expression.

Balancing as a method of determining the value of expression, while a part of all theories of expression (including Scanlon's own), is inherently an "artificial creation" of a particular political institution. Different political theories place different values on free expression, and much of what we see as "natural" in protection of expression is in fact only a function of our own system. "An account of freedom of expression might show the doctrine to be artificial . . . if it identified the class of protected acts simply as those acts recognized as legitimate forms of political activity under a certain constitution and gave as the defense of their privilege merely a defense of that constitution as reasonable, just, and binding on those to whom it applied" (1972, p. 205). For example, when Meiklejohn bases his theory of protected expression on the need for citizens in a democracy to be well informed, he is relying on an artificial theory, for it is based on a created political institution. Scanlon is not suggesting that relying on artificial bases for free expression is wrong, only that

doctrines must be understood in this manner. And while most theories do have at least some grounding in artificial creations, Scanlon suggests, theories that are based on some conception of natural rights (such as Rawls') are stronger.

Scanlon, though he never expressly says so, bases his theory on a concept of natural rights or principles. In doing so, he is attempting to improve upon Meiklejohn. Meiklejohn, in articulating his doctrine of protected expression, tried to create a category in which speech was protected absolutely, a category that could not be subject to balancing. This was an admirable effort, Scanlon acknowledges, faulty only because it relied on a created political institution for protected status. In another society, in which citizens had no need for information, Meiklejohn's category would no longer need protection. Scanlon wants to create a similarly protected category, but one based on natural principles that would not fail in a different surrounding.

In doing so Scanlon draws the line dividing protected and nonprotected expression not between speech and action, or political speech and non-political speech, but between "expression which moves others to act by pointing out what they take to be good reasons for action and expression which gives rise to action by others in other ways, e.g., by providing them with the means to do what they wanted to do anyway" (1972, p. 212). Interference with expression in the first category is forbidden. He takes part of his theory from Mill's belief that "there is significant benefit in being exposed to ideas and attitudes different from one's own, though this exposure may be unwelcome" (1979, p. 524). Typical doctrines of free expression, Scanlon argues, are claimed to be based in the rights of individuals, yet typically use audience interests as a defense. Holmes' (and, indirectly, Milton's) "marketplace of ideas," for example, while arguing for individual speech rights, is doing so because society as a whole, in the form of the audience, will benefit. Even Mill, in *On Liberty*, "argues that a policy of non-interference with expression is preferable to a policy of censorship on two grounds: first, it is more likely to promote the spread of true beliefs and, second, it contributes to

the well-being of society by fostering the development of better (more independent and inquiring) individuals" (Scanlon, 1979, pp. 528-529). Most theorists argue that audiences should have information available to them, but couch that argument in the right of the individual. Scanlon's principle, on the other hand, is based primarily on the audience as receiver of information, and not on the individual's right to impart information.

Scanlon's principle arises from his view that "the powers of the state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents" (1972, p. 215). As autonomous agents, citizens have a right to choose what they will believe, rather than have the government act as a gatekeeper rationing information to them. Nevertheless, Scanlon outlines six areas of expression in which autonomous citizens would allow state intervention:

> 1. Like other acts, acts of expression can bring about injury or damage as a direct physical consequence. . . . It seems clear than when harms brought about in this way are intended by the person performing an act of expression, or when he is reckless or negligent with respect to their occurrence, then no infringement of freedom of expression is involved in considering them as possible grounds for criminal penalty or civil action.
> 2. [Communication is not protected] when one person intentionally places another in apprehension of imminent bodily harm.
> 3. Causing others to form an adverse opinion of [a person] by making him an object of public ridicule. Obvious examples of this are defamation and interference with the right to a fair trial.
> 4. As Justice Holmes said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic."
> 5. One person may through an act of expression contribute to the production of a harmful act by someone else, and at least in some cases the harmful consequences of the latter act may justify making the former a crime as well. . . .
> 6. Suppose some misanthropic inventor were to discover a simple method whereby anyone could make nerve gas in his kitchen out of gasoline, table salt, and urine. It seems just as clear to me that he could be prohibited by law from passing out his recipe on handbills or broadcasting it on television as that he could be prohibited from passing out free samples of his product in aerosol cans or putting it on sale at Abercrombie and Fitch. In either case his action would bring about a drastic decrease in the general level of personal safety by radically increasing the capacity of most citizens to inflict harm on each other (1972, pp. 210-212).

These six points, some of which remain unclear throughout Scanlon's discussion, come together in his Millian Principle (named because it is "a natural extension of the thesis Mill defends in Chapter II of *On Liberty*"):

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consist merely in the fact that the act of expression led the agents to believe (or increased the tendency to believe) these acts to be worth performing (1972, p. 213).

The Millian Principle is not all-encompassing, even Scanlon acknowledges. It cannot hope to restrict or even account for all government interferences with free expression, and makes no attempt to do so. It is not a theory of rights; alone it is merely a system of limitations on government. It does, however, bring in a concept of natural principles not based on a particular political institution, which can be combined with balancing and other artificially created bases for free expression to create a stronger theory of first amendment protection.

Criticisms of the Millian Principle

There are, however, criticisms of the Millian Principle, focused in three areas. First, Scanlon argues that the Millian Principle is supported by our "normal views about legal responsibility." Robert Amdur substitutes "moral" for "legal" to more clearly define the statement, and questions whether or not the principle is supported by our normal views about moral responsibility. He does not believe so: "When a speaker or writer persuades or incites another person or persons to commit a harmful act, our intuitions suggest that the speaker or writer bears some responsibility for the resultant harm. This is not to deny that the person who commits the harmful act is also

responsible, it is simply to insist that according to our normal views concerning responsibility, the speaker or writer is responsible as well" (Amdur, p. 295).

Amdur outlines the second criticism of the Millian Principle based on Rawls' "original position."* Would autonomous, equal citizens in something like the original position choose the Millian Principle to guide them? Probably not, suggests Amdur. Instead, he argues, autonomous agents will freely give up some of their right to hear, simply because they need someone or some institution to filter the massive amount of information coming at them. The autonomous person therefore cannot hear all arguments on all issues, but will accept this as a consequence of living in a diverse and complicated society.

The final criticism, and the only one that Scanlon answers satisfactorily, concerns the ability of the audience to distinguish good information from bad. The audience's interest in expression is not that it wants to hear everything, but that it wants to hear everything that provides "a good environment for the formation of . . . beliefs and desires" (Scanlon, 1979, p. 527). Or as Tucker (p. 36) puts it, "we are often vulnerable as the recipients of communications." Scanlon, when faced with this particular criticism, backs down. In his 1979 updating of his theory of expression, he agrees that somehow the audience must have a way of controlling the accuracy of information given to it, but he does not explain how this might be done in context of the Millian Principle. One possibility might be to add a seventh category of non-protected expression, this one dealing with false information. It would have meet two requirements, however. First, the information must consist of facts capable of being proved false, and second, the facts must in fact be proved false. Care would be taken not

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*Rawls' "original position" is a hypothetical situation in which, essentially, people have no knowledge of their position in life--whether they are poor or rich, young or old, powerful or oppressed, male or female. Individuals in the original position, commissioned to organize a society and create moral and legal rules, would tend to make those rules benefit the least-well-off person in the society, for individuals would realize that they each could be that person.

to include rhetorical statements or opinions masquerading as fact, thus the context of the specific fact would also have to be taken into consideration.

Scanlon does not apply his theory directly to any specific Supreme Court speech cases; he uses only hypothetical examples. He does, however, briefly examine the role of the Millian Principle in wartime. Though the Millian Principle covers only a narrow spectrum of speech situations, within its boundaries it is absolute. Yet Scanlon agrees that in some instances that might be troubling: "There may seem to be an obvious case for allowing deviations from the principle in time of war or other grave emergency" (1972, p. 224). But because the principle is extremely specific, he argues, it can already accommodate some restrictions on speech (for example, prior restraint of information that "might present serious hazards to public safety by giving people the capacity to inflict certain harm" [1972, p. 224]) that apply equally during war or peace. War does not give a government extra power to inhibit debate, even on sensitive issues. This power, even when debate threatens to "divide the country or otherwise to undermine [the government's] capacity to meet a present threat" cannot be allowed under the Millian Principle. There are no exceptions.

Would the Millian Principle have offered a stronger defense in the Espionage Act cases? The Supreme Court test of "clear and present danger" outlined in those cases, despite its seeming power to protect all but the most dangerous speech, could do nothing for the men and women imprisoned for speaking their beliefs about the war. The rest of this paper will examine the nine Espionage Act cases, and will apply the Millian Principle to them, in hope of formulating a stronger protection of free speech, one which would have allowed a fuller debate on the issues during World War I.

Applying the Millian Principle--The Espionage Act Cases of World War I

In 1917, just over two months after the United States declared war on Germany and entered World War I, the United States Congress passed the Espionage Act of 1917. There were already on the books several statutes dating from the Civil War, which allowed prosecution of conspirators "aiming to resist recruiting and conscription by riots and other forcible means, or seeking by speeches and publications to induce men to evade the draft" (Chafee, p. 37). But the Department of Justice wanted stronger measures, for the Civil War statutes did not allow prosecution of "isolated" individuals--a person working alone did not qualify as a conspirator.

The Espionage Act of 1917 began to solve the Department of Justice's dilemma. The third section of that act made criminal three types of acts:

> 1) Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, 2) and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, 3) or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both (quoted in Chafee, p. 39.)

Even this, however, was not enough. The following year, in May 1918, Congress amended the Espionage Act by making it illegal to "attempt to obstruct" recruiting and enlistment (as a part of clause 3), and added nine more offenses. Individuals could now be prosecuted for

> 4) saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice; 5) uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States; 6) or the Constitution; 7) or the flag; 8) or the uniform of the Army or Navy; 9) or any language intended to incite resistance to the United States or promote the cause of its enemies; 10) urging any curtailment of production of any things necessary to the prosecution of

> the war with intent to hinder its prosecution; 11) advocating, teaching, defending, or suggesting the doing of any of these acts; and 12) words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein (Chafee, pp. 40-41).

Under the Supreme Court rulings both the original act and amendment were without question constitutional, as was the way in which they were applied. But would that have been the case had the Court been using the Millian Principle as a guide? Likely not. The first clause of the original act, which made criminal making or conveying "false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies" might have passed the Millian Principle test. The Millian Principle as originally outlined by Scanlon made no exceptions for false statements, but as Scanlon later admits, audiences can be vulnerable to false information, especially if there is no correct information available. Thus, under an amended version of the Millian Principle, this particular clause could be acceptable as a legitimate government interference with communication.

Clauses 2 and 3 of the original Act, which made illegal causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty, and obstructing or attempting to obstruct recruiting and enlistment, both surely would be unconstitutional when applied to speech. The key concept of the Millian Principle is the limitation on government intervention with regard to speech that leads to unlawful action, as long as the connection between the speech and the unlawful action consists of the speaker leading the actor to believe the act to be worthwhile. Violators of this section of the Act would be protected because responsibility would be with the audience. If the speech in question did cause audience members to be disloyal, to refuse duty, or to mutiny, they could possibly be subject to prosecution under a different statute, but the original speech would be protected. Speech that would not be protected in this area might include a call to attack a military recruit who is presently in the

crowd, or defaming the recruit directly (defaming the government, however, would be acceptable).

The remaining nine clauses, all stemming from the 1918 amendment to the Espionage Act, also would be ruled unconstitutional under a Millian interpretation of the first amendment. These clauses make a crime of saying anything that obstructs the sale of U.S. bonds; uttering, printing, writing or publishing disloyal, profane or abusive language intended to bring the government, flag, Constitution, or military uniforms into disrepute; language intended to incite resistance to the United States; urging curtailment of munitions production; advocating, teaching, or defending any of the above acts; or showing favor toward the cause of the country's enemies. Each of these involves some measure of communication rather than action. Whether or not action in these instances would be unconstitutional is a question the Millian Principle cannot answer, but as long as the act in question involves communication of some type--speaking, writing, printing, publishing--it is protected.

Given, then, that the Espionage Act, with the possible exception of the first clause, would be unconstitutional under a first amendment theory incorporating the Millian Principle, all nine of the cases considered here would have been dismissed. Advocating socialism, encouraging munitions workers to stop work, or advising draftees that conscription is despotism all would be allowed. Though each of these might lead audience members to have "false" beliefs (at least in the eyes of the government), they are not harmful enough to allow government intervention.

The Supreme Court did, however, eventually rule that both the Act of 1917 and its amendment of 1918 were constitutional. Even Justices Holmes and Brandeis, who formulated their "clear and present danger" doctrine from cases brought under the Act, did not question the constitutionality of the Act itself. Questions arose instead about the application of the Act: "Undoubtedly some utterances had to be suppressed. We were passing through a period of danger, and reasonably supposed the danger to be

greater than it actually was. . . . Action in proportion to the emergency was justified, but we censored and punished speech which was very far from war" (Chafee, p. 106). Over 2000 prosecutions of the Espionage Act and its amendment went through the federal judicial system, many of which falsely constructed the Act, according to Chafee (p. 51): "The courts treated opinions as statements of fact and then condemned them as false because they differed from the President's speech or the resolution of Congress declaring war. . . . Almost all the convictions were for expressions of opinion about the merits and conduct of the war."

This occurred partly because district judges who heard the cases had no precedent to follow. No major decisions or interpretations of the first amendment protection of speech had yet been formed, thus judges had to use their own interpretations. It was left to the Supreme Court to begin to formulate a first amendment doctrine, when the Court heard nine of the Espionage Cases during 1919 and 1920. The Espionage Act did not come before the Court until after the end of the war, however, so the interpretation of the first amendment that did begin to form was no help to free and open discussion during the war. "It was too late for anything our highest court said to lessen to restrictive effect of the Act. . . . Thus we cannot rely on the Supreme Court as a safeguard against the excesses of war legislation. . . . The nine justices of the Supreme Court can only lock the doors after the Liberty Bell has been stolen" (Chafee, p. 80).

Decisions in the nine cases came after the hysteria of the war was over, thus it seems likely that the justices would have felt freer to view the Act as unconstitutional. They, however, did not. In each of the cases the Act was found constitutional, and in most cases the convictions were upheld. Though Holmes and Brandeis did outline their "clear and present danger" doctrine in one Court opinion and several dissents, the doctrine did nothing to help those convicted of violating the Espionage Act.

The Early Cases--Schenck, Sugarman, Frohwerk, and Debs

The first Espionage Act case to come before the Court was *Schenck v. United States* and *Baer v. United States* (249 U.S. 47), argued January 9, 1919, and decided March 3, 1919. Schenck and Baer, whose cases were decided together, were convicted of causing and attempting to cause insubordination and of obstructing recruiting and enlistment. They had mailed circulars that "intimated that conscription was despotism in its worst form" (249 U.S. at 51) to men who had passed exemption boards. This was, according to Chafee, one of the few of the 2000 prosecutions under the Act in which there really was incitement to resist the draft, and thus, Schenck had violated the Espionage Act. Justice Holmes apparently agreed, for in a unanimous opinion for the Court he upheld the conviction, even as he proclaimed the doctrine of "clear and present danger":

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterances will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right (249 U.S. at 52).

Regardless of the specific outcome of this case, Holmes is suggesting, there are cases in which the government is allowed to abridge the free speech guaranteed in the Constitution. While Schenck and Baer might have been allowed the right of free speech in another time, during war time the definition of allowable speech narrows: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done" (249 U.S. at 52). If Schenck and Baer had printed their circular a few years later, they would not have been prosecuted, according to Justice Holmes. But the words would have been the same; only the situation would have changed. Holmes and the rest of the Court were not

looking at the words printed as much as they were looking at their interpretation of potential audience reaction. It appears, then, that at one level Schenck and Baer were sent to prison because the judicial system feared their audience, not their actual words.

Neither Justice Holmes nor Chafee acknowledges this point. Several times in succeeding cases Holmes and the other justices reaffirm their decision in *Schenck*, and Chafee suggests that the decision was a just one, one which did not even turn on an interpretation of the first amendment. Schenck and Baer's utterances, he says, "could fairly be considered a direct and dangerous interference with the power of Congress to raise armies. . . . Consequently no real question of free speech arose" (p. 81). No question of free speech arose, Chafee seems to be saying, because they were guilty; in his opinion they violated the Espionage Act. Yet in another time they would not have been guilty, and Chafee would have defended them. Again, they were prosecuted and convicted not specifically for their words, which in a timeless world would be protected, but because of fear of the reaction of their audience, which was time-specific. How could no question of free speech arise, when the same case later would have contained the issue of free speech? Chafee does not address this paradox. It seems very clear that this was in fact a case about free speech, and that the speech itself, apart from its surroundings, was protected. Unfortunately for Schenck and Baer, the Congress and the Supreme Court let their fears about reaction to provocative speech get in the way of the first amendment.

Had *Schenck* been interpreted with the Millian Principle as a guideline, the outcome would have been very different. Holmes' underlying distinction between speech in war and speech in peace would not be acceptable under the Millian Principle, not only because the principle itself does not make that distinction, but also because of the implied emphasis on possible audience reaction. The country has an interest in maintaining order during war by prohibiting some types of speech, Holmes suggests, but the difference between the situations is in how the readers and listeners

might react, and in turn how that reaction might affect the ability of the country to make war. Hinging the protection, or lack thereof, on the audience is unacceptable under the Millian Principle. Members of the audience are responsible for their actions, even if those actions were precipitated by a particular act of speech.

The second case, *Sugarman v. United States* (249 U.S. 182) was argued and decided on the same days as *Schenck*. *Sugarman* was dismissed for want of jurisdiction, but was later used, in *Schaefer v. United States* (251 U.S. 466), as precedent for determining the constitutionality of the Espionage Act of 1917. Though the defense had, as in *Schenck*, questioned the constitutionality of the Act, the only reference to the constitutionality question in Brandeis' opinion for the Court was the statement that a "mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding" (249 U.S. at 184). It seems possible, then, that Brandeis would have been willing to consider the question of constitutionality, had a better argument been made for it.

The third case, *Frohwerk v. United States* (249 U.S. 204) was decided by the Court only one week later, on March 10, 1919. This, another unanimous decision, was written by Holmes, who argues that had more evidence been presented to the Court, there might have been cause for a reversal. Frohwerk had printed various statements praising the German people and questioning the reasons for the war--"we went to war to protect the loans of Wall Street"--but the Court could not be sure that he had violated the Espionage Act.

> It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war. It does not appear that there was any special effort to reach men who were subject to the draft. . . . When we consider that we do not know how strong the Government's evidence may have been we find ourselves unable to say that the articles could not furnish a basis for a conviction (249 U.S. at 208, 209)

Thus, while Frohwerk's conviction was upheld, it is clear that Justice Holmes was not convinced of Frohwerk's guilt. And here Holmes appears to be laying groundwork for a narrowing of the interpretation of the Espionage Act. Some speech, at least, that condemned the war might constitutionally be protected, as long as it was not aimed at those subject to the draft, and as long as it was sufficiently general. Nevertheless, the Act was still constitutional--speech that had a tendency to cause specific results was forbidden.

In this case is Holmes appears to be backing away slightly from his earlier outline of "clear and present danger." Here we see the possibility that "clear and present danger" in some form and the Millian Principle could be compatible as guidelines for government interpretation. If "clear and present danger" were interpreted extremely narrowly, as it could have been to overturn this case, Holmes' test would mesh with the Millian Principle, particularly under the sixth of Scanlon's exceptions, which allows government intervention in the case of a "drastic decrease in the general level of personal safety by radically increasing the capacity of most citizens to inflict harm on each other."

The last of the early set of cases, *Debs v. United States* (249 U.S. 211) was also decided on March 10, 1919. Debs, too, was convicted of causing and inciting insubordination and obstructing recruiting and enlistment. Debs had given a speech to a group of socialists in which he lauded socialism, expressed his "opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States," and "said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer he meant more" (249 U.S. at 213). Justice Holmes, who again wrote the opinion, here backs away from his "clear and present danger" test, and instead suggests that even though Debs' speech was for the most part rather general and vague, Debs could still be convicted.

> Such a speech is not protected because of the fact that the purpose to oppose the War and obstruct recruiting, and the expressions used in that regard, were but incidental--parts of a general propaganda of socialism and expressions of a general and conscious belief. . . . The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. . . . [I]f a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech" (249 U.S. at 211, 212-213).

But in fact Debs did not directly encourage obstruction of recruitment. If he did it at all, it was in such veiled terms that a later reader of his speech could not be sure what he meant at the time. Justice Holmes and the Court, then, upheld Debs' conviction not for what he did say, but for what he did not say but perhaps meant. In other words, he was convicted in part for what his audience might have inferred from his speech. This is clearly a violation of the Millian Principle. Even Chafee, who for the most part agrees with Holmes and Brandeis in their various decisions, questions this: "Debs' utterances are hard to reconcile with the Supreme Court test of 'clear and present danger' . . . . It is regrettable that [Holmes] felt unable to go behind the [jury's] verdict" (Chafee, p. 84). What Holmes and the Court were in fact doing was accepting the trial jury's version of events, and the jury's understanding and interpretation of both the Espionage Act and possible audience reactions to Debs' speech.

Debs spoke to a group of Socialists, people who had come to the gathering specifically because they were interested in the topic. While of course it is conceivable that some audience members were swayed to change their opinions by Debs' speech, it is more likely that most agreed with him from the beginning. The audience would not have come to new, "false" beliefs because of Debs, but even if they had, it would not matter under the Millian Principle. Debs had a right to speak, but more importantly, his audience had a right to be free to hear what he had to say. Debs did not violate the Espionage Act on its face--Holmes upheld the conviction on what he, Holmes, thought Debs was implying. Here "clear and present danger" did not work, not because it could

not have, but because it was not invoked narrowly enough. The Millian Principle, on the other hand, would have cleared Debs of any wrongdoing.

November 1919--Stilson and Abrams

After the Supreme Court handed down these four decisions in March 1919, there were no more Espionage Act cases for eight months. By the time the next two cases were heard and decided, the war had been over for a full year. *Stilson v. United States* and *Sukys v. United States* (250 U.S. 583) was decided not on the first amendment question but on legal technicalities involving the trial. Stilson and Sukys had printed and distributed a newspaper and circulars in the Lithuanian language. The only mention of the first amendment issue was in Justice Day's opinion for the Court. "Since the proceedings in [the lower] court some of the constitutional questions have been determined, and need not be considered. *Schenck v. United States, Frohwerk v. United States, Debs v. United States*" (250 U.S. at 585).

Far more important to the issue of first amendment protections during war time was the next case, *Abrams v. United States* (250 U.S. 616), decided on November 10, 1919. It marked the first test of the 1918 amendment to the Espionage Act, for Abrams and his four co-defendants were charged under the more restrictive amendment; in particular, one of the counts of the indictment accused them of obstructing the production of munitions. The five, all Russian-born, were accused of distributing two leaflets, which had been thrown out of a window onto the street below by one of the defendants. The leaflets, one in English and the other in Yiddish, protested U.S. policy in Russia, a country with which the United States was not at war. Neither leaflet protested against the declared war on Germany, and the English one even explained that its author was not pro-Germany. In addition, the prosecution could not prove that any munitions worker saw the circulars, or that anyone was affected by reading them, so no danger to the country, no "clear and present danger," was apparent.

The opinion of the Court, written by Justice Clarke, argues that the intent of Abrams and the others was to

> persuade persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war. . . . While the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe (250 U.S. at 620-621, 623).

Clarke reads into the circulars what he and the majority of the Court see as the intent of Abrams and the others. While "intent" to cause harm is in fact illegal under the Espionage Act, a conviction for intending but not actually causing a particular reaction is permissible under neither a narrow reading of "clear and present danger" nor the Millian Principle. But the Millian Principle was not actually used as a test in this case, and Holmes and Brandeis did not have the votes to apply "clear and present danger." So once again, individuals were convicted not for their speech--for these leaflets did none of these things overtly--but for what the justices feared the audience would read into the speech. And again where the "clear and present danger" test could not protect freedom of speech, the Millian Principle, had it been used, would have.

To shore up his findings, Clarke selectively applies the Espionage Act to the leaflets. One did clearly accuse President Wilson of being a hypocrite and a coward, and because the Espionage Act of 1918 punished language bringing contempt or scorn upon the form of government of the United States, Clarke sees this as clearly violating the Act. To do this, however, he has to argue that calling the president a coward is the same as bringing contempt upon democracy itself.

> A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress. . . . But it is not

> necessary to a decision of this case to consider whether such distinction is vital or merely formal (250 U.S. at 623-624).

Holmes and Brandeis, finally, cannot agree with the conviction. In their stinging dissent, they bring back the "clear and present danger" doctrine, which was of course by this time precedent, having first been outlined in the Court opinion in *Schenck*. In this case, however, they apply "clear and present danger" in favor of those convicted of violating the Espionage Act. Holmes reiterates his belief that in some instances governmental interference in free speech is acceptable, but argues that in this instance the government's prohibition was unacceptable:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in times of war than in time of peace because war opens dangers that do not exist at other times.
>
> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so (250 U.S. at 627-628).

Here Holmes and Brandeis are repeating their mistake in *Schenck*. Speech should be equally protected in war and peace--as it would be under the Millian Principle--for it is the non-speech situation, not the speech itself, which changes. Holmes argues that a narrower conception of protected speech is acceptable during wartime because it is only during war that grave enough evils exist. What Holmes either does not see or is willing to accept is that he is judging speech not by its inherent character, but by the reaction it could cause.

Despite the fact that wartime does cause danger Congress has a right to prevent, those dangers did not exist in this case. Holmes and Brandeis agree with the majority that the leaflets did "urge curtailment of production of things necessary to the

prosecution of the war within the meaning of the Act of May 16, 1918," (250 U.S. at 626) but disagree that Abrams and the others had this result as an intent, which the prosecution had to prove in order to convict the five. "The defendants," they explain, "had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them" (250 U.S. at 629). And not only was this conviction unconstitutional, the majority missed the philosophy of the first amendment itself.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out, that at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment (250 U.S. at 630).

Holmes and Brandeis had delivered the first of their dissents in the Espionage Cases, but it still was not the Act itself that was under fire; the dissenting justices saw only the construction and application as unconstitutional.

The last cases--Schaefer, Pierce, and O'Connell

The Court remained quiet on the Espionage Act until the following spring, when the final three cases were decided. In March, the Court upheld the convictions of three of the five defendants in *Schaefer v. United States*, (251 U.S. 466). Lawyers for Schaefer and the others had argued that both the Espionage Act of 1917 and its amendment of 1918 were unconstitutional, but Justice McKenna, in the opinion of the Court, disagrees. The Act of 1917 had been found constitutional in *Sugarman*, and the amendment in *Stilson*. McKenna does give a fuller discussion to the issue than had Clarke in *Abrams* or Day in *Stilson*. Freedom of speech and press, while not absolute rights, he writes, are "elements of liberty. . . . Indeed they are so intimate to liberty in every one's convictions--we may say feelings--that there is an instinctive and instant

revolt from any limitation of them either by law or a charge under the law, and judgment must be summoned against the impulse that might condemn a limitation without consideration of its propriety." But this is not a concern in this case, writes McKenna, therefore "we bring this case, as it should be brought, like other criminal cases, to no other scrutiny or submission than to the sedate and guiding principles of criminal justice" (251 U.S. at 474-475). Concern for free speech is certainly valid, he is suggesting, but not in this instance, for free speech was not violated. Nevertheless, McKenna makes an argument for speech as a natural law, a natural right, the only time in the nine cases that speech is specifically seen this way. In some ways McKenna's beliefs parallel Scanlon's perception of the adequate theory of free expression. The Millian Principle is founded partly on the concept of natural rights, those which do not take their meaning from particular political institutions. It is only a step, albeit a long one, from McKenna's notion of speech as a natural right to the protection of that right under a theory such as the Millian Principle.

But speech is not protected by the majority in *Schaefer*, and once again Brandeis and Holmes must argue for their "clear and present danger test" from a dissenting opinion. Justice McKenna had pulled from the newspaper articles published four sentences that he claims were false and therefore punishable under the 1918 amendment. But taking those sentences out of context altered their meaning, argue Brandeis and Holmes. Brandeis then prints the entire contents of the articles in question, suggesting that the Court had upheld a conviction based on "remote or possible effect," not imminent danger. Further, he writes, "The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason" (251 U.S. at 493). Finally, he writes, "Convictions such

as these, besides abridging freedom of speech, threaten freedom of thought and of belief" (251 U.S. at 495). It is not just the speaker's freedom of thought and belief that is threatened by these decisions, it is also the audience's, for in order to form thoughts and beliefs, individuals must be allowed to gain information freely.

The final two decisions on the Espionage Act were handed down in March and May 1920. In the second of these, *O'Connell et. al. v. United States* (253 U.S. 142), very little was said about the first amendment, while the "clear and present danger" test was not mentioned at all. Justice McReynolds wrote the opinion for a unanimous Court, saying merely that "the constitutionality of [the Espionage Act] is settled by opinions of this court announced since the writ of error was sued out. . . . *Schenck*; *Frohwerk*. Also the criminality of a conspiracy to obstruct recruiting and enlistment by persuasion has been determined. *Schenck*." (253 U.S. at 148). The case hinged primarily on a violation of the Selective Service Act and details of the timing of the trial.

The last significant Espionage Act case, then, was *Pierce et. al. v. United States* (252 U.S. 239). Three New York Socialists were prosecuted for distributing a Socialist pamphlet. It "contained much in the way of denunciation of war in general, the pending war in particular, something in the way of assertion that under Socialism things would be better, little or nothing in the way of fact or argument to support the assertion" (Chafee, p. 92). Pierce's counsel had argued that the clear and present danger test had not been met, nor had the prosecution proven that the pamphlet would produce the "forbidden consequences." Justice Pitney, in answering these charges, says simply that that was not a decision the Court could make: "Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at trial" (252 U.S. at 244). And, foreshadowing another first amendment test, he also writes, "Whether the printed words would in fact produce . . . [an] interference with the recruiting or enlistment service . . . was a question for the jury to decide in

view of all the circumstances of the time and considering the place and manner of distribution" (252 U.S. at 250) Because the jury had determined the pamphlet did not meet the "clear and present danger" test, then, Pitney declined to overturn the conviction.

Justices Holmes and Brandeis took this final occasion to dissent in favor of those convicted of violating the Espionage Act. They argue first that the very same pamphlet had been found legal in a trial in Baltimore, and in fact the New York Socialist Party had held off distributing it until the outcome of that trial was learned. But more importantly, Holmes and Brandeis assert that this ruling would inhibit free discussion of ideas: "To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental" (252 U.S. at 269). They also argue that simple tests of criminality under the Espionage Act had not been met, nor had intent to interfere with the operations of the military been proven. Finally, the Court had not proven that the "clear and present danger" test was applicable. In this dissenting opinion, Holmes and Brandeis offer nothing new, but simply reiterate their doctrine of free speech protection.

Summary and Conclusion

Did the "clear and present danger" test work? Not in these nine cases. After Holmes outlined it in the Court opinion in *Schenck*, the majority rarely mentioned the test: In several cases it was completely ignored except in the dissent, in some only minimal attention was given to it, and in others the majority seems to imply that its test

for government intervention was met. And in none of these cases was it able to actually protect the right of free speech.

Could "clear and present danger" protect free speech during a war? Chafee seems to think so. He agrees with Holmes and Brandeis that there is a point when government intervention in speech is acceptable--Holmes and Brandeis say it implicitly in their test of when government may intervene, and Chafee says it outright several times: "Undoubtedly some utterances had to be suppressed," "We can all agree from the start that there must be some point where the government may step in" (pp. 106, 3). Yet the very point of the "clear and present danger" doctrine was to provide the Court with a map, a three-step test for when the first amendment could be abridged. And that was only rarely, in extreme circumstances. Or was it? In only three of the nine cases do Holmes and Brandeis dissent using the test of "clear and present danger." In the other six cases they either agree--together they even write four of the Court opinions--or they remain silent on the first amendment question. While dissenting in *Abrams*, Holmes says he fully agrees with the affirmation of the convictions in *Schenck*, *Frohwerk*, and *Debs*. Yet it can be argued that both *Frohwerk* and *Debs* did not fall under the prohibitions of the Espionage Act. In Frohwerk's case,

> Even in the Department of Justice there was considerable question whether [the articles printed] did not merely advocate a change in governmental policy as distinguished from an obstruction of such policy, and no special effort appeared to reach men who were subject to the draft. . . . [While] the Debs decision showed clearly the evils of the broad construction of the Espionage Act. . . . Debs was convicted of an attempt to cause insubordination in the army and obstruct recruiting, yet no provocation to any such definite and particular acts was proved. He spoke to a convention of Socialists in support of their economic views, instancing the war as the supreme curse of capitalism (Chafee, pp. 83, 85).

Clearly, then, the test of "clear and present danger," at least as it was applied by the Supreme Court in the Espionage Cases, was ineffectual. Yet on the surface "clear and present danger" seems an adequate method for handling situations such as these. So what went wrong? Other than the fact that the majority simply was not willing to

apply the test stringently enough, there seem to be three problems with the "clear and present danger" doctrine. First, it allows government intervention in a way that could be defined very differently by different justices. Though it seems concrete enough, the majority in these cases obviously thought it had been met, while Holmes and Brandeis occasionally disagreed. While, as Chafee writes, "some utterances must be prevented," there is not enough agreement, even when applying the doctrine, which utterances fall into the protected category. Somehow, the test must be made more specific. Second, implicit in the application of the "clear and present danger" test is a fear of the audience and its possible reaction. It is this fear of what listeners and readers might do with the information that allows the Court to prohibit individual speech. Underlying this is the presumption that if the audience hears, it might be persuaded, for if there were no chance that the audience would be persuaded, then there would be no harm in the speech. But if the audience might be persuaded, does that not mean that the argument being put forth has some merit? And if the arguments of Schenck and Abrams, of Pierce and Schaefer had merit, did not the audience have a right to hear them, so that members of the audience could make up their own minds?

Third, and finally, is the problem of balancing. The Court acknowledged that it was in fact balancing various rights in these cases, but, as Chafee argues, it was balancing individual rights against societal rights, and society's rights weighed heavier.

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion. . . . Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. . . . [T]here are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances

> and which shall be protected and become the foundation of a legal right (Chafee, pp. 31-32).

When individual interests conflict with society's interests, society must come first, the Court seemed to say. Chafee agrees that there are both individual and social interests at play in these cases, but argues that looking at the balance in that way is inherently biased. Instead, the individual right to free speech must also be seen as an interest of society. Only then can the two interests be weighed against each other fairly:

> The great trouble with most judicial construction of the Espionage Act is that this social interest [of society in free speech] has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. . . . The failure of the courts in the past to formulate any principle for drawing a boundary line around the right of free speech not only threw the judges into the difficult questions of the Espionage Act without any well-considered standard of criminality, but also allowed some them to impose standards of their own and fix the line at a point which makes all opposition to this or any future war impossible (Chafee, p. 34).

If a re-casting of the weights were all that was necessary, the "clear and present danger" test could serve well as a measure of when the government may intervene in the individual right of free speech. But the other two problems, the fear of potential audience reaction and the ease with which the doctrine can be interpreted in different ways, suggest that another doctrine or principle would provide better protection for the first amendment. What is needed is a stronger principle, one which ideally would have found the Espionage Act unconstitutional, or at the very least would have found the applications of the Act unacceptable.

That stronger principle can be found in Scanlon's work. His Millian Principle solves the three difficulties faced by the doctrine of "clear and present danger." First, it is less likely to be interpreted in a variety of ways. Though it is narrow, it is an absolute protection against government intervention for the speech situations it covers. It does not differentiate between speech in war and peacetime, and consequently does not suffer from the dilemma of some utterances being protected during peace but not during war. Second, it does not have an underlying fear of

potential audience reaction, and in fact audience reaction is specifically not relevant for the situations protected by the principle. By focusing on the audience members' right to hear, and on their own responsibility for their actions, the Millian Principle takes pressure off speakers and off the government, for regulation of speakers is no longer necessary to "protect" an audience from "dangerous" information. The Millian Principle places government in a less parental role than do most theories of free expression, and assumes that audience members can and should decide for themselves what to believe. Third, the Millian Principle does not involve the balancing aspect of the "clear and present danger" and other doctrines. While Scanlon acknowledges that balancing is appropriate in theories of free expression, it is not present within the narrow confines of the Millian Principle. This is a consequence, Scanlon argues, of his principle's base not in the guarantees of political institutions such as the United States Constitution, but in natural principles that are beyond the reach of limitations set by politics and in the fundamental principle of liberalism--that there must be limitations on government in order to allow individuals the freedom to live in liberty. The Millian Principle, then, would have provided a stronger defense of freedom of speech in the Espionage Cases. Despite its limitations and its narrow scope, the Millian Principle does provide a safe haven for speech during time of war.

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PUBLIC OPINION:
AN INFLUENCE IN SUPREME COURT LIBEL DECISIONS?

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By Linda M. Perry

Public opinion is basic to self-government. However, Supreme Court justices are free to operate without considering public opinion. Because of this undemocratic characteristic, and because there is no appeal from this Court, controversy has surrounded the practice of judicial review since the constitutional debates.

This study examined twenty-one libel opinions to determine how the Court says it considers public opinion. The justices who have written a libel opinion since 1964 have been most prolific in their discussions of public opinion when they try to balance constitutional values with common law interests. This study confirmed three known judicial theories of public opinion, and identified seventeen more. The theories are placed on a model which depicts where the justices line up in their advancement of constitutional values, democratic values, or common law values. The model shows the Court's articulated support for the theories is shifting from the constitutional and democratic side of the model to the common law side, reflecting the justices' tendency to use common law to balance constitutional conflicts. The study lends support to critics who contend the justices' decisions are not derived from the constitution.

PUBLIC OPINION:
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I. PUBLIC OPINION AND THE SUPREME COURT

A. *We the People*

At the birth of the United States, public opinion[1] was recognized as the basic component of democracy.[2] It is the essence of self-government. We the people are sovereign, making our policy preferences known through our elected representatives. Democracy requires a politically informed public.[3] But, as Walter Lippmann observed, "The world that we have to deal with politically is out of reach, out of sight, out of mind."[4] So how does the public become "politically informed"?

B. *Public Opinion and the Press*

The classical view of public opinion held that the press informed and shaped public opinion.[5] Lippmann contended that people rely on the press for a "true picture of all the outer world,"[6] including "the world that we have to deal with politically."[7] The notion of a public informed by the press has since been supported by research: the agenda setting theory also attributes the role of informing public opinion to the

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[1] In common usage, public opinion is a generalized term describing a collective attitude or a public mood. Bernard Hennessy defined public opinion as "the complex of preferences expressed by a significant number of persons on an issue of general importance." B. Hennessy, PUBLIC OPINION, 5th ed., 8 (1985). For a history of the conceptualization of public opinion, *see* F. Allport, *Toward a Science of Public Opinion,* 1 THE PUBLIC OPINION QUARTERLY 7 (1937), V. Price & D. Roberts, *Public Opinion Processes,* in HANDBOOK OF COMMUNICATION SCIENCE 781 (1987).

[2] *See* T. Jefferson, *Letter to Edward Carrington, January 16, 1787,* THE PAPERS OF THOMAS JEFFERSON 48-49 (1955). Jefferson wrote that the basis of government was the "opinion of the people."

[3] *See* L. Lipsitz, *Political Socialization and Public Opinion: Informed Awareness or Complacent Ignorance?* AMERICAN DEMOCRACY 172 (1986).

[4] W. Lippmann, PUBLIC OPINION, 18 (1922).

[5] *See* A. de Tocqueville, DEMOCRACY IN AMERICA 91 (R. Heffner, ed. 1956) (1835). Tocqueville observed during his travels in the United States: "The influence of the liberty of the press does not affect political opinions alone, but extends to all the opinions of men, and modified customs as well as laws."

[6] Lippman, *supra* note 4, at 203.

[7] *Id* at 18.

press.[8] According to this theory, the media set the public agenda, alerting people to issues of the day. Rather than telling people what to think, the press tells people what to think about.

C. *Public Opinion and the Law*

The crucial role that public opinion plays in democracy is making policy preferences known to the representatives that the citizenry elects. This is true theoretically, however, of only two branches of the United States government, the executive and legislative branches. The U.S. Constitution assures the impact of public opinion on the law by providing for the election of representatives,[9] who are empowered to make all federal laws,[10] and for the election of the President,[11] who is charged with executing the laws.[12] The Constitution has left the third branch, the judiciary, free to function in isolation from the electorate.[13] Thus, the judiciary is theoretically free from the force of public opinion.

D. *The Supreme Court*

Article III of the U.S. Constitution established the Supreme Court and provided that justices would be appointed for life tenures "during good Behaviour."[14] But this isolation from public opinion is not absolute. The Court, while not elected, is appointed by the most democratic constitutional officer, the one officer

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[8]For a full discussion of the agenda setting theory, see M. McCombs & D. Shaw, ACQUIRING POLITICAL INFORMATION (1969), and Lang & Lang, *Watergate: An Exploration of the Agenda-Building Process*, 2 MASS COMMUNICATION REVIEW YEARBOOK 447-467 (1981).

[9]U.S. CONST. art. I, sect. 2, cl. 1, amend. XVII.

[10] *Id* at sect. 8.

[11] *Id* at art. II, sect. 1, cl. 1-6, amend. XII.

[12] *Id* at sect. 3.

[13]This is true of the federal judiciary. Judges in most state courts are elected.

[14]U.S. CONST. art. III, sect. 1. Article II, sect. 4, allows that "all civil Officers of the United States, shall be remved from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I, sect. 2, cl. 5 grants sole power of impeachment to the House of Representatives, and sect. 3, cl. 6 grants sole power to try all impeachments to the Senate. No Supreme Court justice has ever been impeached.

representing the entire national electorate, the President. And these appointments must be made with the advice and consent of the Senate.[15]

It is the fact that the justices are appointed for life and not elected that has rendered them politically accountable to no one, isolated from the electorate once they are on the bench. Thus, unlike elected officials who must be mindful of the mass opinion of their constituents, the Court is free to determine the constitutionality of legislation without having to consider public opinion. Justice Antonin Scalia summarized this view in his concurring opinion in *Webster v. Reproductive Health Services*[16] Commenting on the "organized public pressure" placed on the Court as it decided this highly controversial abortion rights case, Scalia said the "carts full of mail from the public, and streets full of demonstrators" indicated a distorted public perception of the role of the Court.[17] Scalia said the public had been

> urging us--their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will--to follow the popular will.[18]

Most constitutional and political science scholars view the Supreme Court as "relatively insulated from political pressures"[19] and free "from direct electoral pressure."[20] This is how the Court operates under its province of judicial review. Yet, despite these widely held views that the Court is meant to be "undemocratic," the issue of whether the Court should consider public opinion in its decisions of law is a controversy that has continued since the constitutional debates.

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[15]Article III grants no power of enforcement or implementation. For that, the Court relies on the democratic branches.

[16]109 S.Ct. 3040 (1989).

[17] *Id.* at 3064-3065.

[18] *Id.* at 3065-3066.

[19]D. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period,* 47 JOURNAL OF POLITICS 652 (1986).

[20]L. Tribe, *Courts Should Not Be Criticized for Ignoring Public Opinion,* CALIFORNIA LAWYER 11 (January 1982).

1. Judicial Review

The Supreme Court itself established the practice of judicial review in *Marbury v. Madison*.[21] In this seminal case Chief Justice John Marshall offers a definition of the practice of judicial review that his opinion established. Judicial review determines: "whether an act, repugnant to the constitution, can become law of the land."[22] And it empowers judges to find that a "law repugnant to the constitution is void. . . ."[23]

Political science Professor Christopher Wolfe defines judicial review according to the era in which it was or is being practiced. *Marbury v. Madison* began what Wolfe calls the traditional era, 1801 to 1863, when "[j]udicial review was simply giving preference to the rule of the Constitution over any legislative or executive act that conflicted with it."[24] Justices "acted within the constraints of a republican public opinion that made the very notion of a 'legislative' form of judicial review unthinkable."[25] After the Civil War the Court entered the "transitional era," and judicial review was transformed "into a defense not so much of the Constitution as of the natural law (or, more precisely, natural rights) and above all property rights."[26] After 1937 the Court adopted the modern view of judicial power as "merely another variant of legislative power."[27] Judicial activisim shifted from economic affairs to civil liberties.

Judicial review has been justified on the basis of the unique qualification of justices to safeguard the Constitution and to serve as protectors of minority and individual rights. Alexander Hamilton declared that life tenures of justices would contribute to "that independent spirit in the judges" essential to safeguarding against "legislative encroachment" on the Constitution. Their independence would protect the Constitution and

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[21] 5 U.S. (1 Cranch) 137 (1803).

[22] *Id.* at 176.

[23] *Id.* at 180.

[24] C. Wolfe, THE RISE OF MODERN JUDICIAL REVIEW 3-4. (1986).

[25] *Id.* at 4.

[26] *Id.* (parenthetical in original).

[27] *Id.* at 6.

individual liberties from the "ill humours" of the people "whenever a momentary inclination happens to lay hold of a majority. . . ."[28]

Hamilton defended the judicial power created by the Constitution in response to Antifederalist criticism. Specifically, Hamilton answered the questions raised in a series of letters by "Brutus" published in *The New York Journal* between October 1787 and April 1788.[29] Brutus predicted the supreme court would practice judicial review. He warned:

> The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. *From this court there is no appeal.* And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. . . .[30]

Brutus summarized Antifederalists' sentiment concerning the proposed judiciary:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are *indepedent of the people,* the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[31]

Professor Ralph Ketcham characterized the Antifederalists as idealists who, instead of seeking to insulate officials from popular influence as the Federalists had,[32] sought close association for people and their representatives. The Antifederalists believed people should have the last say about judicial behavior and be able to remove judges with unpopular interpretations. Ketcham contends, "Anti-federal ideas have also surfaced again and again in various guieses among later generations of Americans" and are "properly viewed as part of the philosophy of the Constitution."[33]

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[28] A. Hamilton, *The Federalist No. 84,* in THE FEDERALIST PAPERS 397 (Bantam Classic ed., 1982) (1787-1788).

[29] R. Ketcham in preface to *"Brutus," Essays I, VI, X-XII, and XV* in THE ANTI-FEDERALISTS PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 269 (R.Ketcham, ed. 1986). Brutus, a psuedonym after the Roman republican, is thought to be Robert Yates, a New York judge

[30] Brutus, *Essay XI, supra* note 29, at 295-297, emphasis added.

[31] *Id.*, emphasis added.

[32] *See generally* Hamilton's arguments as Publius in *Federalist No. 78, supra* note 28, at 392-399.

[33] Ketcham, *supra* note 29, at 18-19.

Professor Lino A. Graglia contends that the argument that public opinion somehow plays a part in the appointment of justices is refuted by history. "Indeed, it might be more accurate to say that that history impressively illustrates the opposite--the near invulnerability of the Court's power."[34]

In the modern debate over judicial review, John Agresto wrote that the responsibility for constitutional interpretation was not intended to belong only to the judiciary. This is so because

> constitutional government implies that the ultimate interpreter of our fundamental law is not an autonomous judiciary but the interactive understanding of the people, their representatives, and their judges together. We should see the American political system not as a pyramid, with the Court at the top as the ultimate authority, but rather as an interlocking system of mutual oversight, mutual checking, and combined interpretation.[35]

Agresto also pointed out that after Chief Justice Marshall argued for the judiciary to be the "ultimate and effective partisan of constitutional and individual rights,"[36] later Courts showed judicial power that was "unfriendly to human or civil rights . . . and oppressive in its result."[37] Indeed, one of the most oppressive results of judicial review came just fifty years after *Marbury*.

In 1857 Chief Justice Roger Taney defended judicial isolation from public opinion when he wrote the court opinion in *Dred Scott v. Sanford*[38] This opinion denied citizenship and freedom to a slave named Dred Scott while it held the Missouri Compromise unconstitutional. The Court held, "The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution, cannot change its construction and meaning, and it must be construed and administered now according to its *true* meaning and intention when it was formed and adopted."[39] This "true" meaning and intention was that "a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States." The Court held that the Constitution treated "this

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[34] L. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARVARD LAW REVIEW 1331, 1342.

[35] J. Agresto, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 10 (1984).

[36] *Id.* at 25.

[37] *Id.* at 27.

[38] 19 How. 398, 60 U.S. 393 (1857).

[39] 60 U.S. at 394, emphasis added.

race . . . as persons whom it was morally lawful to deal in as articles of property and to hold them as slaves."[40]

The idea of a judiciary isolated from public opinion prevails in the modern practice of judicial review, as Justice Scalia's opinion in *Webster* confirms.[41] And, constitutional scholars affirm the practice. In a 1982 article critical of "Gallup Poll justice," Professor Laurence Tribe asserted

> Courts can neither preserve the civil rights and liberties of oppressed minorities and individuals in periods of conservative reaction nor safeguard the integrity of legal procedures and the institutions of property and contract in periods of liberal excess if the courts are punished whenever the judiciary fails to swim with the prevailing political current.[42]

Tribe finds that the idea of the courts owing their allegiance to the "shifting sands of public opinion" is "radically incompatible with the idea of a judiciary insulated from direct electoral pressure."[43]

2. Public Opinion and Supreme Court Justices

Despite views such as Tribe's, U.S. Supreme Court justices appear not to be isolated or immune from public opinion. Chief Justice William Rehnquist has said so publicly on more than one occasion. In April 1986 then-Associate Justice William Rehnquist recognized the influence of public opinion in a speech on "Constitutional Law and Public Opinion" at the Suffolk University School of Law:

> The judges of any court of last resort, such as the Supreme Court of the United States, work in an insulated atmosphere in their courthouses where they sit on the bench hearing oral arguments or sit in their chambers writing opinions.
>
> But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events.
>
> Somewhere "out there," beyond the walls of the courthouse, run currents and tides of public opinion which lap at the courthouse door.
>
> Just as the nineteenth century European astronomers discovered that the presence of the then-unknown planet Neptune had an effect on the orbit of Uranus, if these tides of public opinion are sufficiently great and sufficiently sustained, they will likely have an effect upon the decisions of some of the cases decided within the courthouse.
>
> This is not a case of "knuckling under" to public opinion and cravenly abandoning their oaths of office.

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[40] *Id* at 393.

[41] *See infra* at notes 16-18.

[42] Tribe, *supra* note 20, at 11-12. By punishing the Court, Tribe was referring to criticism and calls for the political defeat of state judges in California who followed their understanding of the law rather than public opinion.

[43] *Id* at 11.

> Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.
>
> And if a judge coming to the bench were to decide to hermetically seal himself off from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead by the state of public opinion at the time he came to the bench.[44]

In a book published in 1987 for "the interested, informed layman,"[45] Rehnquist hinted at how his ideas of the effect of public opinion on the Court developed. Recalling his days of clerkship under Justice Jackson in the 1952-1953 term, Rehnquist wrote, "I was not aware of it at the time, but it seems to me in retrospect that the peculiar national mood with respect to the Korean War played a significant part in the outcome of the Steel Seizure Case."[46] Rehnquist noted that the lower court's ruling and press coverage "gave the dispute momentum as it worked its way toward the Supreme Court."[47] The law on the issues "were clearly in favor of the government," and "the Court's decisions in the preceding fifteen years leaned toward the government," Rehnquist wrote. Yet six justices voted against the government in this case. Why? "I think that this was one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that *this tide of public opinion had a considerable influence on the Court.*[48]

Rehnquist expressed no concern that the justices had been influenced by press coverage of the case and the resulting public opinion. Instead, Rehnquist reiterates his theory:

> I was recently asked . . . whether the justices were able to isolate themselves from the tides of public opinion. My answer was that *we are not able to do so, and it would probably be unwise to try.* We read newspapers and magazines, we watch news on television, we talk to our friends about current events. No judge worthy of his salt would ever cast his vote in a particular case simply because he thought the majority of the public wanted him to vote that way, but this is quite a different thing from saying that no judge is ever influenced by the great tides of public opinion that run in a country such as ours. Judges are influenced by them. . . ."[49]

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[44] W. Rehnquist, *Judicial Isolation,* from speech "Constitutional Law and Public Opinion," delivered at Suffolk University School of Law, in LOS ANGELES DAILY JOURNAL, April 21, 1986, at 4, col. 5.

[45] W. Rehnquist, THE SUPREME COURT: HOW IT WAS, HOW IT IS 7 (1987).

[46] *Id* at 42. The case is Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[47] *Id* at 54.

[48] *Id* at 94-95, emphasis added.

[49] *Id* at 98, emphasis added.

Indeed, Rehnquist defends President Franklin D. Roosevelt's court-packing plan on the basis of the rightness of a president's appointing justices who share his ideology. This is "[o]ne of the many marks of genius" of the Constitution, Rehnquist said, because it allows the judicial branch to avoid subservience to the legislative and executive branches while "avoiding total institutional isolation from public opinion." The Court is independent of popular opinion when deciding particular cases, but "public opinion has some say in who shall become judges of the Supreme Court."[50] Thus, the Court is "subjected to indirect infusion of the popular will."[51]

According to Bob Woodward and Scott Armstrong, Rehnquist's concern for public opinion was shared by other justices. For example, Justice Potter Stewart is quoted as saying, "Public opinion was at stake" on the busing issue. "The mainstream of society opposed forced integration of the schools when it meant busing," and Stewart wanted the Court "to keep that mainstream in mind wherever possible."[52]

Woodward and Armstrong contended that, despite Rehnquist's avowed regard for public opinion, his "very narrow view" of the Fourteenth Amendment worried the more liberal justices. Rehnquist believed the amendment was being misapplied when used to give rights to prisoners, women, or other groups. "For the first time in a half-century, a Justice was flatly stating that *the Court had no business reflecting society's changing and expanding values* . . . The Court had no business forcing its views on the states; it was not the voice and conscience of contemporary society."[53]

3. Current Tides of Public Opinion

In the Court's 1987-1988 term, Justice John Paul Stevens' plurality opinion in *Thompson v. Oklahoma*[54] cited society's "evolving standards of decency"[55] as a rationale to spare people as young as fifteen from the death penalty. Stevens relied on an argument advanced thirty years earlier by Chief Justice Warren

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[50] *Id.* at 235-236.

[51] *Id.* at 250.

[52] B. Woodward & S. Armstrong, THE BRETHREN: INSIDE THE SUPREME COURT 317 (1979).

[53] *Id.* at 261-262, emphasis added.

[54] 108 S.Ct. 2687 (1988).

[55] *Id.* at 2691.

in *Trop v. Dulles*:[56] Warren said the meaning of the Eighth Amendment must be drawn "from the evolving standards of decency that mark the progress of a maturing society."[57] Stevens also noted the jurisprudence of "evolving standards of decency" had been settled in 1910 in *Weems v. United States*:[58] Holding that a sentence of fifteen years of hard labor and deprivation of civil rights was "cruel and unusual punishment," the *Weems* Court wrote

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gives it birth. . . .
>
> The [cruel and unusual punishment clause] in the opinion of the learned commentators may be, therefore, progressive, and is not fastened to the obsolete, but *may acquire meaning as public opinion becomes enlightened* by a humane justice.[59]

Contemporary standards measuring what is cruel and unusual are provided by legislatures and juries, Stevens wrote. The Court also reviewed statistical evidence indicating contemporary morality was not ready to permit the regular imposition of the death penalty in such cases.

The death penalty issue was news again on March 28, 1989. On behalf of an inmate condemned for murder when he was sixteen, defense attorney Nancy McKerrow told the Court, "There is a consensus of opinion in this country against executing our young."[60] Using a twist of the national consensus argument, a sharply divided Court ruled that youths who were sixteen when they committed crimes, as well as the mentally retarded, may be executed. This "national consensus" jurisprudence drew criticism from *New York Times* columnist Tom Wicker. He said,

> In the Court's view, a sufficient "national consensus" that such young people should be spared does not exist because only 12 of the 37 states that sanction the death penalty bar it for those who were under 18 when they committed a capital crime, and 3 bar it for those under 17. Nor is there "yet" such a consensus, in the Court's opinion, for sparing the mentally retarded.
>
> If 19 states, just over half of the 37, banned the execution of underage criminals, would that constitute a consensus?
>
> Would what is constitutional today become unconstitutional tomorrow, in that case?

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[56] 356 U.S. 86 (1958).

[57] *Id.* at 101.

[58] 217 U.S. 349 (1910).

[59] *Id.* at 373-374, 378, emphasis added.

[60] *Court Looks at Death Penalty for Young Killers,* The Gainesville Sun, March 28, 1989, at A3.

> Is the Supreme Court of the United States a poll-taker or a head-counter rather than a judicial body solemnly charged with the power to interpret the Constitution?[61]

Perhaps the most intense controversy to swarm around the Court in decades concerned *Webster v. Reproductive Health Services*,[62] a Missouri abortion case that had the potential, but stopped short of, overturning *Roe v. Wade*.[63] As the justices prepared to hear the case, Associated Press reporter Strat Douthat quoted leaders of opposing factions who were firm in their shared beliefs that the Court could be swayed by public opinion.[64] Both factions staged marches, sit-ins, and letter-writing blitzes, as well as buying newspaper and magazine ads aimed at the Court, the attorney general, and the White House. "The underlying design is to put pressure on the Supreme Court: the activists are convinced the court's decision can be swayed by public opinion." Reporting the march of an estimated 300,000 abortion rights supporters in Washington, D.C., R.W. Apple, Jr., said the attempt "to bring public opinion to bear" on the Supreme Court was really aimed at two justices, Sandra Day O'Connor and Anthony M. Kennedy, who were considered swing votes on the issue.[65]

In his opinion for a badly fractured Court in *Webster*,[66] Chief Justice Rehnquist wrote

> The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today.[67]

Justice Scalia wrote a scathing concurrence, chiding the rest of the majority, and Justice O'Connor in particular, for not addressing the issue of whether *Roe v. Wade* should be overturned. Only limiting *Roe*

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[61] T. Wicker, *Have justices become poll-takers?* The Gainesville Sun, June 30, 1989, at A10, col. 3.

[62] 109 S.Ct. 3040 (1989).

[63] 410 U.S. 113 (1973).

[64] S. Southat, *Lobbying Intense as Abortion-Case Hearing at Hand,* The Gainesville Sun, March 12, 1989, at 2A.

[65] R. W. Apple, Jr., *The Justices Are People; Climate of Their Era May Have An Affect,* The New York Times, April 10, 1989, at A1, and *Justices Feel Influence of Thier Times* at A8

[66] Parts of Rehnquist's opinion was written for the 5-4 majority and parts for a plurality. The result of *Webster* was to allow further state intrusion into the privacy right established in *Roe* and to change the focus of determining state interest in protecting the unborn.

[67] 109 S.Ct. at 3058.

rather than overturning it outright left the Court as the "object of the sort of organized public pressure that political institutions in a democracy ought to receive."[68]

Justice Blackmun in dissent said that because the Court was "needlessly reaching out to address constitutional questions that are not actually presented," Blackmun said he feared for the "integrity of, and public esteem for, this Court."[69] Blackmun's concern echoes the philosophy expressed by Justice Brennan that it is important to maintain "public confidence in the administration of justice."[70]

E. *Public Opinion and Media Law*

1. The Constitution and the press

Many jury decisions--one way the Court recognizes majority public opinion[71]--ultimately reach the Court in the course of judicial review. Public opinion when expressed as jury verdicts in cases involving the media can have a chilling effect on the vigor of the press. Because the press is a major source of information necessary for self-government, the Court has found some jury verdicts a threat to the constitutional values expressed in the First Amendment. Justice Jackson wrote in 1943

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[72]

This justification for judicial review seems relevant when we consider recent surveys finding that the public's understanding of media law, the U.S. Constitution, and the Bill of Rights is marginal.

Recent Hearst (1987) and Gallup (1985-1987) polls found that only a minority of adult Americans have a clear understanding of the First Amendment and the role of a free press in American democracy. Moreover, a majority of Americans surveyed favored curtailing press freedom in some way. The Hearst

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[68] *Id.* at 3064. *See also* Scalia's other comments regarding the role of the Court, *infra* notes 16-18.

[69] *Id.* at 3067.

[70] Richmond Newspapers v. Virginia, 448 U.S. 555, 595 (1980).

[71] The Supreme Court has characterized the jury as a "link between contemporary community values and the penal system," Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), and "a body truly representative of the community," Smith v. Texas, 311 U.S. 128, 129-130 (1949). The Court in Williams v. Florida, 399 U.S. 78 (1970), upheld a six-member jury as "a representative cross-section of the community."

[72] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

Corporation reported in February 1987 that a bare majority of Americans surveyed knew the purpose of the U.S. Constitution, while fifty-nine percent did not know what the Bill of Rights is.[73] A 1985 Gallup poll commissioned by Times Mirror found that only forty-five percent of those surveyed knew that freedom of the press is guaranteed in the Bill of Rights.[74] The Hearst poll found sixty-one percent of those surveyed favored convening a constitutional convention to consider amendments on several issues, including freedom of the press. Those who knew the most about the Constitution were the least likely to support changing it.

In what it calls the "acid test" of public attitudes toward the press, the Gallup organization found that fifty-four percent of its 1985 respondents believe news organizations protect the democratic process. Twenty-three percent say the press hurts the process. The Gallup poll also found that while Americans in general value a free press, only a slim majority (fifty-four percent) think it should be "very difficult" for the government to stop publication of news stories.[75]

Although the Court recognized as early as 1908 that "all such previous restraints upon publication" are forbidden by the Constitution, the Court has allowed the "subsequent punishment" of the press.[76] Punishing publication is one way to control the press. One way the press is punished is with the common law tort of libel. This is an area where public opinion is expressed through jury verdicts, yet it is an area of law generally misunderstood by the public.

2. Libel

The Gallup Organization found in its 1985 survey that laws pertaining to libel are widely misunderstood. Although a majority (fifty-eight percent) of respondents reported they understood libel,

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[73] *Poll finds Americans have shaky knowledge of U.S. Constitution,* The Washington Post, reprinted in The Gainesville Sun (Florida), Feb. 15, 1987, at A7.

[74] THE PEOPLE AND THE PRESS 18 (1986). The year-long study polled a nationally representative sample of 2,104 for a margin of error of plus-or-minus three percentage points (at 61).

[75] This is the government practice of prior restraint, a well settled area of law as interpreted by the Supreme Court. The Court has noted the "chief purpose" of the liberty of press is the "guaranty to prevent previous restraints upon publication," but that this protection was not absolute. Near v. Minnesota, 283 U.S. 697 (1931).

[76] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

seventy-three percent did not know that libel laws are "different for public officials and private citizens."[77] In fact, the public "rejects the notion that public officials should face a tougher standard of proof than anyone else." Gallup reported, "The public neither understands nor accepts the rationale of actual malice."[78] Seventy-five percent believe libel law should be the same for public officials and private citizens. Sixty-seven percent believe that news organizations should have to pay damages if a story the organization believed was true turns out to be false. Gallup summarized: "Knowledge about press law and regulation is often less than what we would expect to see by chance--indicating public misunderstanding, not mere lack of information."[79]

A report of the Annenberg Washington Program Libel Reform Project states the libel reform project was initiated because of the "chilling effect of expensive and protracted litigation."[80] Rodney Smolla, project director, said the libel reform project was started because of heightened concern over the increased incidence of libel actions in the early and mid-1980s.[81] However, the project has found that more libel cases are being won by the media and that awards against the media are dropping. The improvements may reflect the media's self-imposed restraints to avoid libel actions rather than any change in public attitudes toward the press.[82]

Public opinion, when it is represented by juries with attitudes like those described by the Annenberg Project and the polling organizations, can inhibit the process by which it is informed. The Court has recognized that biased juries can cause the press to censor itself. In announcing the Court's decision in *New York Times v. Sullivan*,[83] Justice Brennan said a constitutional safeguard was a necessary standard to allow "breathing room" for unintended error in publications. Otherwise,

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[77] THE PEOPLE AND THE PRESS, *supra* note 74, at 18

[78] *Id* at 36.

[79] *Id* at 18.

[80] PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM 9 (1988).

[81] Comments by R. Smolla, Libel and Privacy Today symposium, University of Florida College of Law (Oct. 30, 1989).

[82] *Id*

[83] 376 U.S. 254 (1964).

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[84]

Brennan also pointed out that a chilling effect on the press "dampens the vigor and limits the variety of public debate" necessary for self-government.[85]

The Court's recognition of the need both for safeguards against juries which threaten constitutional rights, and for public confidence in the judicial system, suggests the Court must resolve "the tension between judicial review and majoritarian principles."[86] Some contemporary research suggests ways the Court balances these competing interests.

F. *Contemporary Research*

Few scholars have examined the relationship between public opinion and Supreme Court decisions. One study by David G. Barnum of DePaul University found that the Court's decisions from 1937 to 1980 that overturned legislation or protected minority rights have coincided with trends in public opinion. When public support was lacking, the Court has seemed reluctant to act. Barnum characterized the Court's power to overturn acts of Congress as creating "a tension between judicial review and majoritarian principles."[87] Only on the issue of prayer in public schools did Barnum find evidence of a countermajoritan decision. However, Barnum said the Court's decisions that were opposed by a majority of Americans none-the-less were compatible with the *trend* of public opinion on school segregation, interracial marriage, and abortion.[88]

Cecilie Gaziano, a graduate student at University of Minnesota, found that Supreme Court decisions on freedom of expression for deviant political groups are related to public opinion on the issue.[89]

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[84] *Id* at 279, quoting Speiser v. Randall, 357 U.S. 513, 526.

[85] 376 U.S. at 279.

[86] Barnum, *supra* note 19, at 653.

[87] *Id* at 652.

[88] Barnum does not define what he means by a trend of public opinion. He appears to use the term to describe an emerging consensus, before the consensus actually commands a majority of the national population.

[89] C. Gaziano, *Relationships Between Public Opinion and Supreme Court Decisions: Was Mr. Dooly Right?* COMMUNICATION RESEARCH 131 (1978).

Professor Thomas R. Marshall identified four judicial theories of public opinion.[90] He found that direct mentions of public opinion reflect one of these theories:

(1) Some forms of speech or action inform and influence public opinion, and they merit constitutional protection.

(2) Elected officials and public opinion adequately protect constitutional rights; thus, judicial review is not necessary.

(3) Law and policy should reflect changing public opinion.

(4) In some instances, public opinion poses a threat to constitutional rights.[91]

Marshall also found that more than three-fifths of the modern Court's decisions reflect public opinion majorities or pluralities. He found that the Court is especially majoritarian in crisis times and when reviewing federal laws and policies. He concluded that the Court's agreement with popular opinion is one of the indices of the stability of its decisions.[92]

Marshall found 142 direct mentions of public opinion from 1934 through the 1985-1986 term, an average of three direct mentions per term.[93] But Marshall conceded this is "only a conservative estimate of the modern Court's attention to public opinion."[94] The Court often uses synonyms, and Marshall listed several of these. Marshall appears to throw up his hands at the task of counting decisions that indirectly refer to public opinion because of the sheer number of synonyms for public opinion in Court opinions.[95] Marshall also found that direct mentions since the mid-1930s most often occur in disputes concerning the criminal process, press coverage, freedom of speech, and labor-related cases.[96]

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90 T. Marshall, PUBLIC OPINION AND THE SUPREME COURT 36-37 (1989).

91 *Id* at 7-8.

92 *Id*

93 *Id* at 35. By direct mention, Marshall referred to the exact words "public opinion."

94 *Id* at 31.

95 *Id* at 32.

96 *Id* at 34.

Marshall found that the Court seldom mentions public opinion polls as evidence of public opinion, and that half of these mentions occur in death penalty cases.[97] He said the Court cites as evidence of public opinion: referendum results, news coverage, juror attitudes, mob actions, elite attitudes, legislation, lower court decisions, officeholders' actions, or the Court simply cites "well recognized" public opinion with no evidence.[98]

Marshall, Barnum, and Gaziano compared existing public opinion survey data to Supreme Court opinions of the time-period studied. Only Marshall examined decisions for direct mentions of public opinion.[99] Barnum did note, however, that watching only "what the Court does, and not what it *says* it is doing . . . will make it virtually impossible to identify public opinion as anything other than one possible cause among many."[100]

6. *Implications*

The historical overview of judicial review suggests that the Court's isolation from public opinion was at the heart of the controversy of judicial review. Further, the constitutional debates suggest judicial review was a bipartisan issue. A judiciary that interacts with public opinion appears to have been the ideology of the Antifederalists, and perhaps the Jeffersonians. Judicial review appears to have been a one-party concept--the ideology of the Federalists. The fact that the judicial-review debate continues today suggests a need to study how the Supreme Court considers public opinion. The infamous disregard for public opinion expressed by the *Taney* Court in denying citizenship to a class of people solely because of their ancestry would seem to underscore the folly of a judiciary totally isolated from evolving public opinion. On the other hand, the implications of the findings of the Gallup and Hearst surveys regarding public knowledge of Constitutional provisions suggest that the Court must be removed from the pressure of public opinion if the Court is to carry out its historic function of protecting constitutional values from the tyranny of the majority.

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[97] *Id* at 32.

[98] *Id* at 33-34.

[99] *Id* at 31-67.

[100] Barnum, *supra* note 19, at 663 n.20, emphasis added.

Modern concerns indicate a need to study how the Court considers public opinion. And, as Barnum suggests, it is important to study what the Court *says* it does regarding public opinion. This study attempts to discover how the Court says it considers public opinion in rendering libel decisions.

II. METHODS AND MATERIALS

No research has been published which examines the Court's opinions exhaustively for every reference to public opinion. Researchers have found making a precise count of indirect references to public opinion overwhelming because public opinion has so many synonyms. For that reason an exhaustive search for references to public opinion must focus on narrow topics individually. Because of the impact of public opinion on libel verdicts and the public's apparent misunderstanding of libel law, this study focuses on how the Supreme Court says it considers public opinion in libel law.

In constitutionalizing libel in *New York Times v. Sullivan*,[101] the Supreme Court assumed a role in safeguarding the freedom of the press. This role of the Court appears to reflect two of Marshall's judicial theories of public opinion:[102] first, that some forms of speech or action inform and influence public opinion and therefore merit constitutional protection; and second, that in some instances, public opinion poses a threat to constitutional rights.

Support for two hypotheses was predicted: First, the common law of libel was constitutionalized and remains under constitutional safeguards because some forms of speech or action inform and influence public opinion and so should be protected.[103] And, second, jury verdicts in libel actions is an instance of public opinion posing a threat to constitutional rights. If both hypotheses are true, they would imply that justices must carefully balance these competing interests--to protect speech so that public opinion can be adequately informed, and to protect speech *from* public opinion. In addition, the Court's libel opinions were scrutinized for other judicial theories of public opinion. The identified theories were placed in a theoretical framework for understanding how the Court and individual justices say they consider public opinion in libel cases.

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[101] 376 U.S. 254 (1964).

[102] Marshall, *supra* note 90.

[103] *But cf. id* at 41. Marshall cites New York Times v. Sullivan as an example of the Court's giving more weight to other competing values (a public official's right to be protected from libel) than it gives to the role of the press in informing public opinion.

In order to find all references to public opinion within the libel opinions, the study combined legal research with contextual content analysis. With a grounding in libel law, the author read the opinions for references to public opinion, which often were discerned from the context of the opinion. A writing justice may never use the exact term public opinion, or even a close "synonym." And yet, following a precise definition of public opinion, one may discern that the justice in the text of a paragraph or a number of sentences is actually talking about public opinion. Thus, the reference is found contextually.

This study used Hennessy's definition of public opinion: "the complex of preferences expressed by a significant number of persons on an issue of general importance."[104] A mention of public opinion in this study was classified as direct, indirect, or implied, depending on how precisely the writing justice used his or her terminology. A mention can be direct in this study without using the exact term, public opinion. This study considers a mention as a direct one if it expressly follows Hennessy's definition. An indirect mention of public opinion is one that, taken in context, refers to an element of Hennessy's definition of public opinion, such as the expression of collective opinion. References often are made to protecting information that is important for informed public opinion. Such information is an element which may include an individual's expression or opinion, but the information is important to a significant number of people. An implied mention of public opinion is one which must be discerned from the context of the opinion, or the mention taken in the context of the opinion may refer to dynamics of public opinion. The mentions also were categorized by the public opinion theory expressed.

The libel opinions were coded and the mentions tallied for each libel opinion, for each justice; for each theory; for the categories of direct, indirect, and implied; for Court (majority) opinions; for concurring opinions; and for dissenting opinions. The data were entered into matrices and compiled by computer for each category. Computer graphs were used to depict relationships among the categories. This paper reports a

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[104]Hennessy, *supra* note 1 at 3. Care was taken not to confuse a reference to the expression of an individual, with which many libel cases are concerned, with a reference to the expression of a significant number of persons, which is a key element of public opinion. This distinction is important since a defamatory publication needs only to be heard or seen by one other individual.

portion of those results. This research analyzed *New York Times* and its progeny in the realm of libel, for a total of twenty-one cases (see Table 1)[105]

TABLE 1
CHRONOLOGICAL TABLE OF CASES

New York Times v. Sullivan, 376 U.S. 254 (1964).
Garrison v. Louisiana, 379 U.S. 64 (1964).
Linn v. Plant Guard Workers, 383 U.S. 53 (1966).
Rosenblatt v. Baer, 383 U.S. 75 (1966).
Ashton v. Kentucky, 384 U.S. 195 (1966).
Curtis Publishing Co. v. Butts, and Associated Press v. Walker, 388 U.S. 130 (1967).
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).
St. Amant v. Thompson, 390 U.S. 727 (1968).
Ginzberg v. Goldwater, 396 U.S. 1049 (1970).
Greenbelt Co-Op Publishing Assn. v. Bresler, 398 U.S. 6 (1970).
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
Time Inc. v. Pape, 401 U.S. 279 (1971).
Ocala Star-Banner v. Damron, 401 U.S. 295 (1971).
Rosenbloom v. Metromedia, 403 U.S. 29 (1971).
Gertz v. Welch, 418 U.S. 323 (1974)
Time Inc. v. Firestone, 424 U.S. 448 (1976)
Herbert v. Lando, 441 U.S. 153 (1979).
Hutchinson v. Proxmire, 443 U.S. 111 (1979).
Wolston v. Readers Digest, 443 U.S. 157 (1979).
Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).
Philadelphia Newspapers v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986)

III. PUBLIC OPINION AND LIBEL

Public opinion is at the heart of the application of constitutional protection to libel actions. Virtually every justice who wrote a libel opinion since *New York Times v. Sullivan* referred indirectly or at least by implication to public opinion. As predicted, the justices in libel cases refer to public opinion in the context of Professor Marshall's first and fourth judicial theories of public opinion: "Some forms of speech or action inform and influence public opinion, and they merit constitutional protection" (hereinafter M1); and "In some instances, public opinion poses a threat to constitutional rights" (hereinafter M4). In addition, support was found for Marshall's third judicial theory: "Law and policy should reflect changing public opinion" (hereinafter M3).[106] In addition to the support found for three of the theories indentified by Marshall, this

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105 One libel opinion, Harte-Hanks Communications v. Connaughton, 109 S.Ct. 2678 (1989), decided by the Court after the data were obtained, is not included in this study. The decision affirmed a $200,000 libel damage award against an Ohio newspaper and the trial court's application of actual malice. The opinion does not add to the body of judicial theories of public opinion, except to add marginally to the numbers of supporting mentions of some of the theories identified in this study.

106 Marshall, *supra* note 90 at 36-37 (1989).

study identified seventeen more judicial theories of public opinion. These twenty theories, then, are the ways in which the Supreme Court justices say they consider public opinion in libel decisions.

A. *Overview*

Whether written as an opinion for the Court, as a concurrence, or as a dissent, the justices' discussions of public opinion are only theoretical in libel opinions. The Supreme Court has not considered public opinion as evidence in libel. For example, the Court has not discussed the merits of using public opinion polls as evidence of defamation, a procedure several trial courts have allowed.[107] However, the Court had an opportunity to review *Ginzburg v. Goldwater*,[108] a libel case in which a report of a purported poll of psychiatrists was part of the defamatory statements written against Senator Barry Goldwater. But the Court denied certiorari and left standing a one-dollar compensatory damage award and a $75,000 punitive award.

The justices mentioned public opinion by a myriad of terms, for a total of 767 mentions in the twenty-one libel cases studied. The number of mentions of public opinion in libel opinions vary considerably from case to case. The most frequent mentions of public opinion occur in cases that introduced, developed, or argued against one of the public opinion theories identified in the study. Table 2 lists the total number of mentions of public opinion per case. Each case is keyed to the graphs presented in this study.

TABLE 2
TOTAL COUNT OF MENTIONS AND
KEY TO CHRONOLOGICAL TABLE OF CASES

Key	Case	Number of Mentions
1.	New York Times v. Sullivan	75
2.	Garrison v. Louisiana	25
3.	Linn v. Plant Guard Workers	7
4.	Rosenblatt v. Baer	34
5.	Ashton v. Kentucky	5
6.	Curtis Publishing Co. v. Butts, Associated Press v. Walker	41

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[107] Public opinion polls have been used to determine whether language contested in a libel suit could be interpreted by the public as defamatory. *See generally* Haller, *Using Public Opinion Surveys*, 8(4) LITIGATION 17-18 (1982). Polls have been held admissable as to the impression or effect of an alleged libel or slander on the minds of individuals (12 ALR 2d 1005, 76 ALR 2d 619).. *But see* Ollman v. Evans, 750 F.2d 970 (D. C. Cir., 1984), wherein Judge Robert Bork criticized the use of surveys to assess reputation because of disputes about polling methodology, because respondents are not examined under oath, and because the use of polls would confuse juries.

[108] 396 U.S. 1049 (1970).

7. Beckley Newspapers Corp. v. Hanks	0
8. St. Amant v. Thompson	2
9. Ginzberg v. Goldwater	7
10. Greenbelt Co-Op Publishing Assn. v. Bresler	10
11. Time Inc. v. Pape	5
12. Ocala Star-Banner v. Damron	2
13. Monitor Patriot Co. v. Roy	15
14. Rosenbloom v. Metrodmedia	100
15. Gertz v. Welch	137
16. Time Inc. v. Firestone	56
17. Herbert v. Lando	42
18. Hutchinson v. Proxmire	17
19. Wolston v. Readers Digest	38
20. Dun & Bradstreet v. Greenmoss Builders	111
21. Philadelphia Newspapers v. Hepps	38
Total Number of Mentions	767

B. *The Cases in Order of Frequency of Mentions*

In case 15, *Gertz v. Welch,* the study identified 137 mentions of public opinion, more than any other case studied. *Gertz* is a watershed case, wherein the Court in 1974 limited application of the *New York Times* actual malice[109] burden of proof to public officials and public figures. The discussion of public opinion centered on two competing standards for applying the *New York Times* burden of proof. The result was that the Court refined the criteria for determining whether a plaintiff was a public figure, and rejected applying *New York Times* actual malice to private plaintiffs involved in matters of public concern. Private plaintiffs need only prove negligence when a defamatory statement made about them was false. Much of the discussion about public opinion in cases that came both before and after *Gertz* centered on the notion of extending the *New York Times* standard of constitutional protection to all statements about matters of public concern.

Gertz is followed in total number of mentions of public opinion by case 20, *Dun & Bradstreet v. Greenmoss Builders,* with 111 mentions. Justice Lewis Powell, in a plurality opinion for the Court in 1985, wrote that Greenmoss Builders was entitled to punitive damages without meeting the *New York Times* actual

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[109] That is, that the defamatory statement was a knowing falsehood or was made with reckless disregard for the truth.

malice standard because the defamatory statments did not "involve matters of public concern."[110] Thus, the speech was not entitled to special protection because it had no value in informing public opinion.

Next in number of mentions is case 14, *Rosenbloom v. Metromedia*, with 100. It was in *Rosenbloom* in 1971 that Justice Brennan, in a plurality opinion, wrote that the *New York Times* actual malice protection should extend "to all discussion and communication involving matters of public or general concern"[111] regardless of the public or private status of the plaintiff. The 100 mentions of public opinion occurred mostly in the arguments for and against this public interest standard. The Court rejected the *Rosenbloom* standard three years later in *Gertz*.

The next case in number of mentions is case 1, *New York Times v. Sullivan*, which established constitutional protection for much of speech that may be defamatory. Many of the seventy-five mentions of public opinion in *New York Times* are found in the now-familiar language that is repeated often in its progeny. For example,

> Thus we consider this case against the background of a profound national commitment to the principle that *debate on public issues should be uninhibited, robust and wide-open*, and that it may well include vehement, caustic and somethimes unpleasantly sharp attacks on government and public officials.[112]

Case 16, *Time Inc. v. Firestone*, further defined when a plaintiff may be considered a public figure and thus required to meet the *New York Times* actual malice burden of proof. Many of the fifty-six mentions of public opinion were concerned with what sort of "public controversy" a person must be involved in before being considered a public figure.

In 1979 the Court in case 17, *Herbert v. Lando*, allowed plaintiffs to meet the *New York Times* actual malice burden by examining the "state of mind" and "editorial processes" of the defendant.[113] Most of the forty-two mentions of public opinion were made in Justice Brennan's dissent, which introduced several theories of public opinion identified in this study.

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[110] 472 U.S. at 763.

[111] 403 U.S. at 44.

[112] 376 U.S. at 270, emphasis added.

[113] 441 U.S. at 160.

Case 6, *Curtis Publishing Co. v. Butts*, established the rule in 1967 that public figures as well as public officials would have to prove *New York Times* actual malice. Many of the forty-two mentions of public opinion centered on the public figure rule.

Case 19, *Wolston v. Readers Digest*, further refined the criteria of who is a public figure. Many of the thirty-eight mentions of public opinion in this 1979 case concerned plaintiffs who had not voluntarily thrust themselves to the forefront of a public controversy.

In case 21, *Philadelphia Newspapers v. Hepps*, the Court required private person plaintiffs involved in matters of public interest to prove the falsity of defamatory statements. Most of the thirty-eight mentions of public opinion in this 1986 case centered on the notion of matters of public interest.

Most of the thirty-four mentions of public opinion in case 4, *Rosenblatt v. Baer*, centered around the Court's discussion of who would be considered a public official for purposes of proving fault in libel cases.

Many of the twenty-five mentions of public opinion in case 2, *Garrison v. Louisiana*, concerned the concept of seditious libel, which had been found unconstitutional in *New York Times* that same year.

In case 18, *Hutchinson v. Proxmire*, the seventeen mentions of public opinion were directed at establishing that a research scientist was not a public figure just because he received federal funds and published his findings.

Case 13, *Monitor Patriot Co. v. Roy*, established that criticism about political candidates must be given as much constitutional protection as criticism of officeholders. Many of the fifteen mentions of public opinion in Justice Potter Stewart's opinion for the Court concerned the impressions of the electorate about political candidates.

In case 10, *Greenbelt Co-Op Publishing Assn. v. Bresler*, Justice Potter Stewart made ten references to public opinion in his opinion for the Court that allowed constitutional protection for a newspaper's accurate report of defamatory statements made at a public hearing.

In case 2, *Linn v. Plant Guard Workers*, the Court said that individuals involved in labor disputes could bring a libel suit against a union in state court without violating federal labor laws. The seven mentions of public opinion concerned the need to allow free debate on issues that divide labor and management.

The seven mentions of public opinion in case 9, *Ginzberg v. Goldwater*, are from Justice Black's dissent from the denial of certiorari and mostly concern the right of people to expess their opinions about public affairs.

In case 5, *Ashton v. Kentucky*, the Court found a law unconstitutional that punished speech "calculated to create disturbances of the peace. . . ."[114] The five mentions of public opinion in Justice William O. Douglas's opinion for the Court centered on the undemocratic nature of the Kentucky criminal libel law and the need for constitutional protection for speech.

Case 12, *Time Inc. v. Pape*, which contained five mentions of public opinion, focused narrowly on the facts of the case and allowed a district court's directed verdict for Time Inc. under the protection of *New York Times* actual malice.

Case 8, *St. Amant v. Thompson*, contained two mentions of public opinion. This 1968 case further refined the legal requirements of establishing *New York Times* actual malice.

Case 13, *Ocala Star-Banner v. Damron*, also with two mentions, held that accusations that a public official has committed a crime is related to the official's fitness for office, and so the official must prove *New York Times* actual malice.

Only case 7, *Beckly Newspapers Corp. v. Hanks*, contains no mentions of public opinion. *Beckly* is a five-page per curiam opinion that addresses the single issue of falsity.

C. *Direct, Indirect, and Implied Mentions of Public Opinion*

A mention of public opinion in this study was classified as direct, indirect, or implied, depending on how precisely the writing justice used his or her terminology.

1. Direct Mentions of Public Opinion

In the twenty-one libel decisions since *New York Times* in 1964, inclusive, the Court used the exact term "public opinion" only twice. The first mention was in Justice Arthur J. Goldberg's concurring opinion in a *New York Times* footnote quoting Justice Black: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion."[115]

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[114] 384 U.S. at 198.

[115] 376 U.S. at 304, n. 5,.quoting Justice Black's concurring opinion in *Barr v. Matteo*, 360 U.S. 564, 577.

The second mention using the exact term "public opinion" came two years later in Chief Justice Earl Warren's opinion concurring-in-result in *Curtis Publishing Co. v. Butts*.[116] Warren discussed the importance of extending the right established in *New York Times* to criticize public officials to include criticism of "public figures." He wrote: "The fact that they [public figures] are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct."[117] This is an example of a direct mention of public opinion in support of Marshall's third judicial theory of public opinion (M3), that law and policy should reflect changing public opinion.[118]

A mention of public opinion can be direct without using the exact term if it tracks Hennessey's definition of public opinion.[119] An example of a direct mention supporting Marshall's fourth theory (M4)--that in some instances public opinion poses a threat to

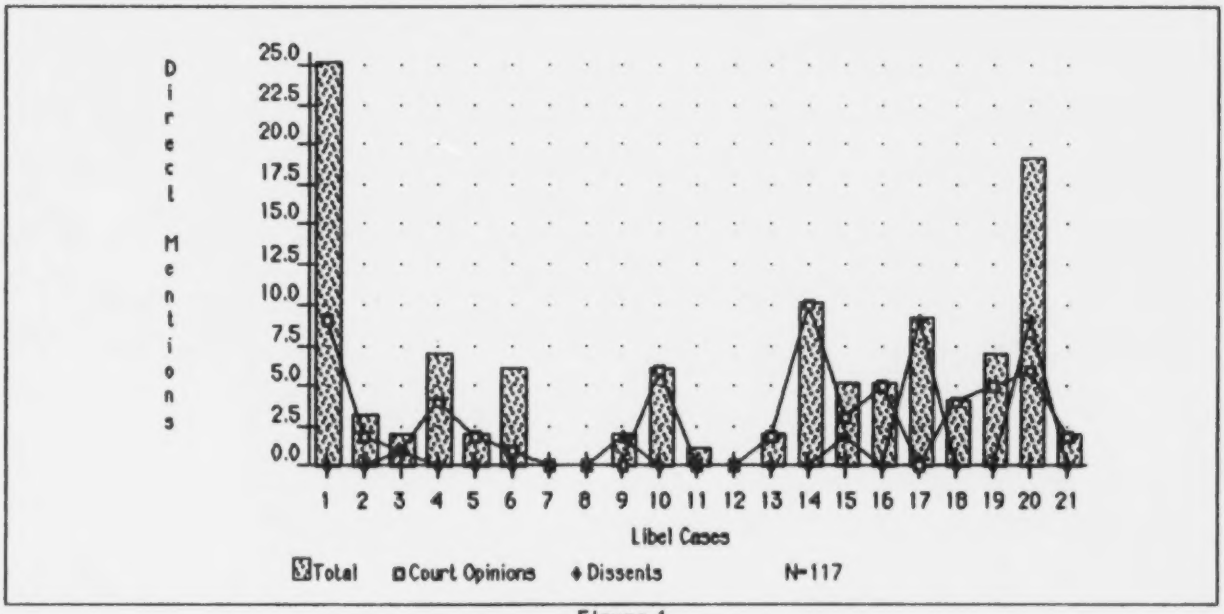

Figure 1
Total Direct Mentions of Public Opinion By Case

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[116] 388 U.S. 130 (1966).

[117] *Id.* at 164, paranthetical added.

[118] Marshall, *supra* note 90 at 45.

[119] Hennessy *supra* note 1 at 8.

constitutional rights[120]--is found in Justice Black's concurring opinion in *New York Times*: "Montgomery is one of the localities in which widespread hostility to desegregation has been manifested."[121] Black then illustrated how public opinion, as manifested in its legally recognized representative, the jury,[122] can threaten constitutional rights, such as the right to expression. He submitted that Montgomery, Alabama's "feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages . . .," and that more "huge verdicts" were "lurking around the corner" for journalists who "might dare to criticize public officials."[123] This direct mention, then, can be seen in the context of Black's reasoning to support M4, the idea that juries as representatives of such public opinion are a threat to constitutional rights when they are used as a "technique for harassing and punishing a free press."[124]

In the twenty-one libel cases studied, a total of 117 direct mentions of public opinion were identified, or just over fifteen percent of the total number of mentions. Of those 117 direct mentions, sixty-two, or about fifty-three percent, are in majority opinions; twenty-three, or nearly twenty percent, are in dissenting opinions; and the remaining thirty-two, or just over twenty-seven percent, are in concurring opinions. *New York Times* and *Dun & Bradstreet* lead the cases in the number of direct mentions. Figure 1 shows how the direct mentions are distributed over the cases and over majority and dissenting opinions.

2. Indirect Mentions of Public Opinion

An indirect mention is one that, taken in context, refers to an element of Hennessey's definition of public opinion. For example, references often are made to the protection of information that is important for informed public opinion. Such information is an element which may include an individual's expression or opinion, but the information is important to a significant number of people. Justice William J. Brennan, writing for the Court in *New York Times*, refers to such information as "matters of the highest public interest

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[120] Marshall, *supra* note 90 at 45.

[121] 376 U.S. at 294.

[122] *See infra* n. 71.

[123] 376 U.S. at 294-295.

[124] *Id* at 295.

and concern."[125] This example of an *indirect* mention of public opinion is in support of M1--the judicial theory identified by Marshall that information that informs public opinion should be protected.

In the twenty-one libel cases studied, a total of 291 indirect mentions of public opinion were identified. This represents thirty-eight percent of the total 767 mentions. Of those 291 indirect mentions, 156, or nearly fifty-four percent, are in majority opinions; ninety, or nearly thirty-one percent, are in dissenting opinions; and the remaining forty-five, or just over fifteen percent, are in concurring opinions. *Rosenbloom* and *Gertz* lead the cases in the number of indirect mentions of public opinion. Both cases involve lengthy debates, mostly in indirect terminology, over applying *New York Times* to public or private plaintiffs involved in matters of public concern. Figure 2 shows how the indirect mentions are distributed over the cases and over majority and dissenting opinions.

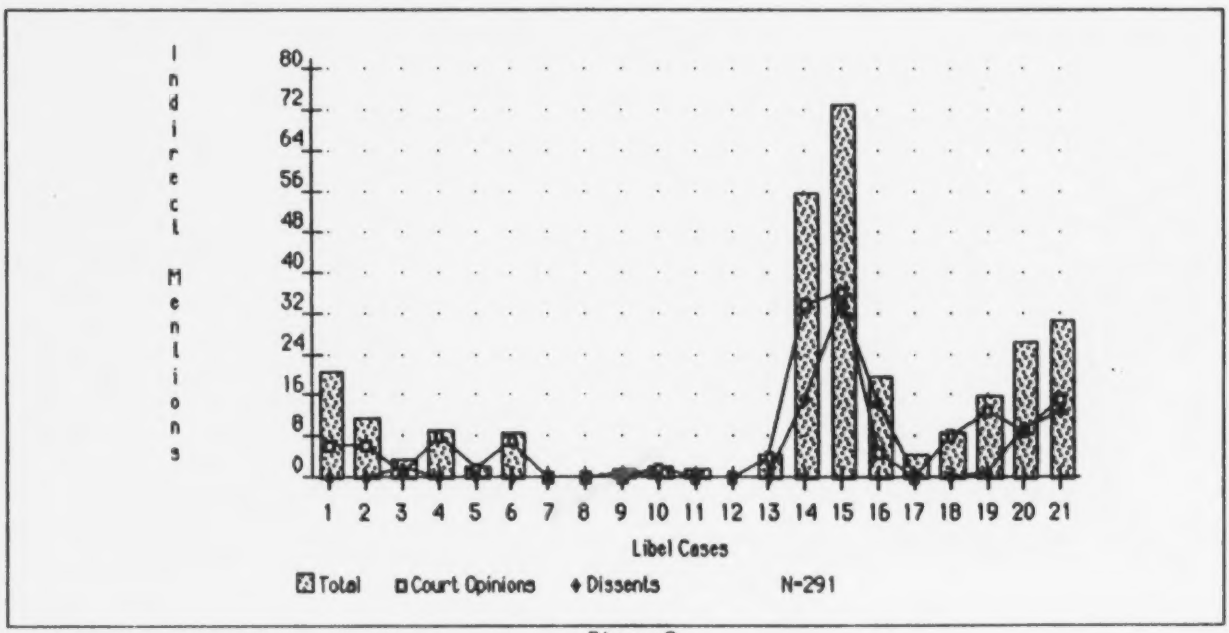

Figure 2
Total Indirect Mentions of Public Opinion by Case

3. Implied Mentions of Public Opinion

Sometimes the reference to public opinion must be discerned from the context of the opinion. Or, the mention taken in context may refer to dynamics of public opinion. For example, Justice Brennan, quoting

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[125] *Id.* at 266.

Justice Louis Brandeis' concurring opinion in *Whitney v. California,*[126] stated the principle that "public discussion is a political duty" and that the founders believed "in the power of reason as applied through public discussion. . . ."[127] Reasoning by the people through public discussion, with its implied reference to the importance of informed public opinion, supports M1 and is an implied reference to public opinion.[128]

In the libel cases studied, a total of 359 implied mentions of public opinion were identified, or nearly forty-seven percent of the total number of mentions (767). Of those 359 implied mentions 149, or 41.5%, are in opinions for the Court; 131, or just over thirty-six percent, are in dissenting opinions; and the remaining seventy-nine, or just over twenty-two percent, are in concurring opinions. Figure 3 shows how the implied mentions are distributed over the cases and over majority and dissenting opinions.

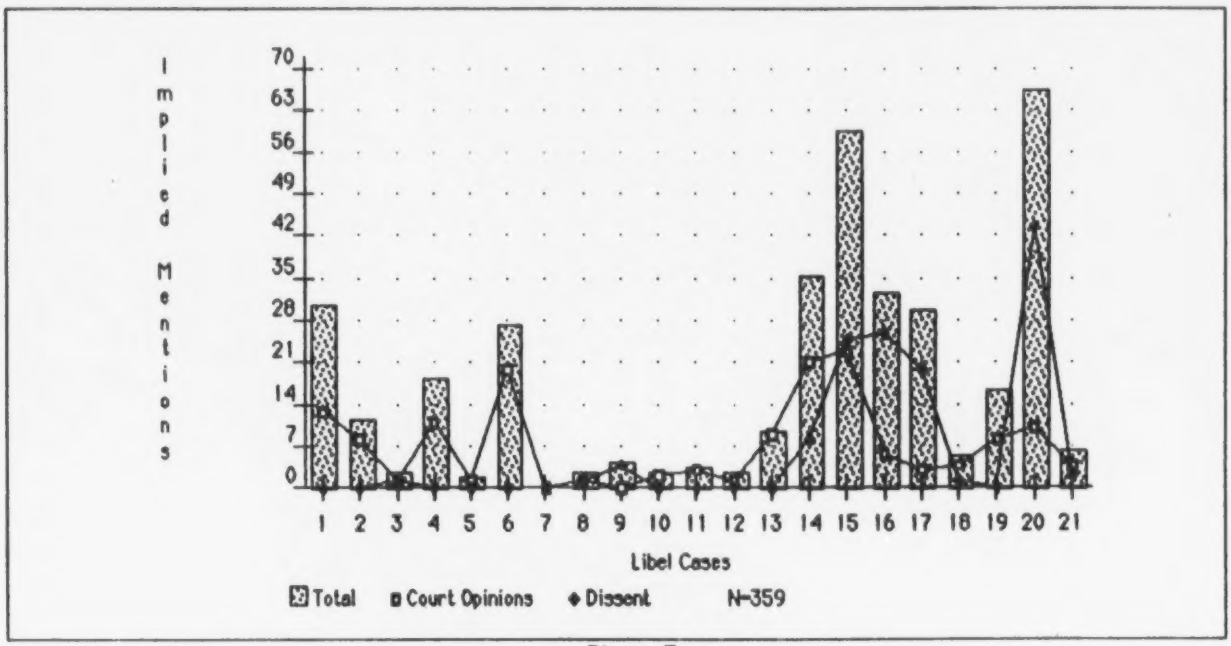

Figure 3
Total Implied Mentions of Public Opinion by Case

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[126]274 U.S. 357.

[127]376 U.S. at 270, citing *Whitney* at 375-376.

[128]This implied mention also supports a direct mention in *New York Times* and a recurring theme in free speech cases that was first articulated in *New York Times* by Justice Brennan: "Thus we consider this case against the background of a profound national commitment to the principle that *debate on public issues* should be uninhibited, robust, and wide-open. . . ." *Id* This direct mention of public opinion was in support of M1.

4. A Comparison of Direct, Indirect, and Implied Mentions

To summarize, this study finds in the twenty-one libel cases 117 direct mentions of public opinion, 291 indirect mentions, and 359 implied mentions, represented in Figure 4.

When direct, indirect, and implied mentions are itemized by case, *New York Times* leads in frequency of direct mentions with twenty-five, which is one-third of the total seventy-five mentions in that case. Next in frequency of direct mentions is *Dun & Bradstreet* with nineteen, which is only seventeen percent of the total 111 mentions in that case. While *Gertz* leads in the frequency of total mentions of public opinion, it holds a scant five direct mentions, which is only 3.6% of the total 137 mentions in that case.

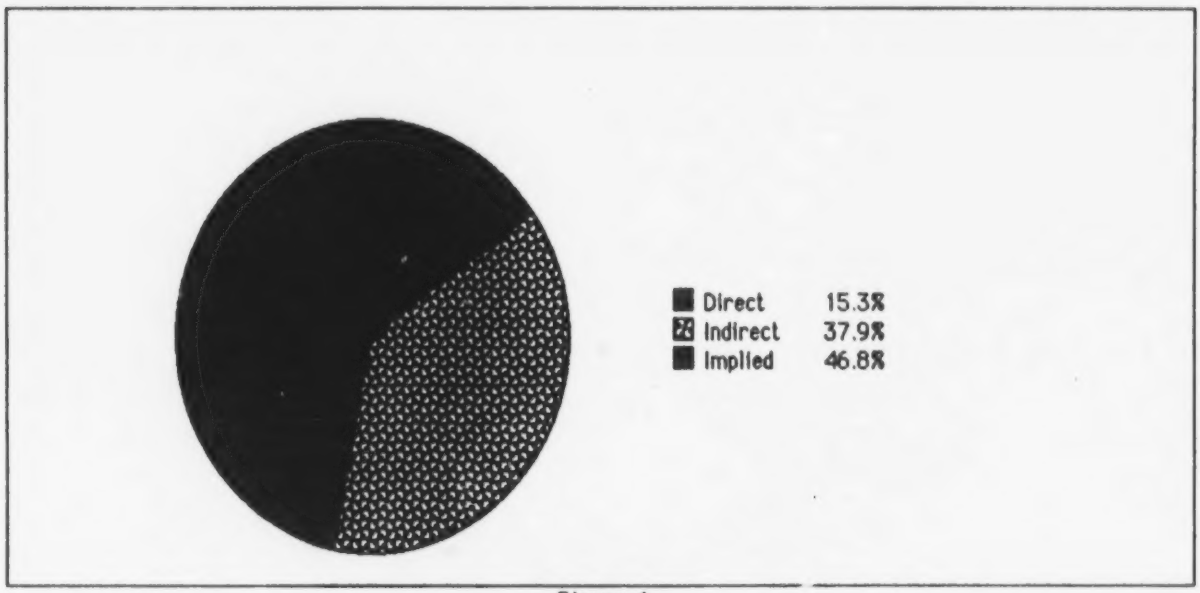

Figure 4
Total References to Public Opinion (n-767)

More than half of the mentions in *Gertz* (thirty-seven, or fifty-three percent) are indirect, and *Gertz* leads the other cases in frequency of indirect mentions. The remaining forty-three percent of the mentions in *Gertz* are implied.

Dun & Bradstreet, which is third in frequency of total mentions, leads all other cases in frequency of implied mentions. Of its total 111 mentions, sixty-six or nearly 59.5% are implied. Twenty-six, or nearly 23.5%, are indirect.

The total number of references to public opinion is itemized by case in Table 3. The key to the cases is in Table 2. The relative frequency of direct, indirect, and implied mentions by case is shown in Figure 5.

Table 3
Total References to Public Opinion by Case

Case	1	2	3	4	5	6	7	8	9	10	11
Implied	30	11	2	18	1	27	0	2	4	2	3
Indirect	20	11	3	9	2	8	0	0	1	2	1
Direct	25	3	2	7	2	6	0	0	2	6	1
Total	75	25	7	34	5	41	0	2	7	10	5

Table 3, continued
Total References to Public Opinion by Case

Case	12	13	14	15	16	17	18	19	20	21	Total
Implied	2	9	35	59	32	29	5	16	66	6	359
Indirect	0	4	55	73	19	4	8	15	26	30	291
Direct	0	2	10	5	5	9	4	7	19	2	117
Total	2	15	100	137	56	42	17	38	111	38	767

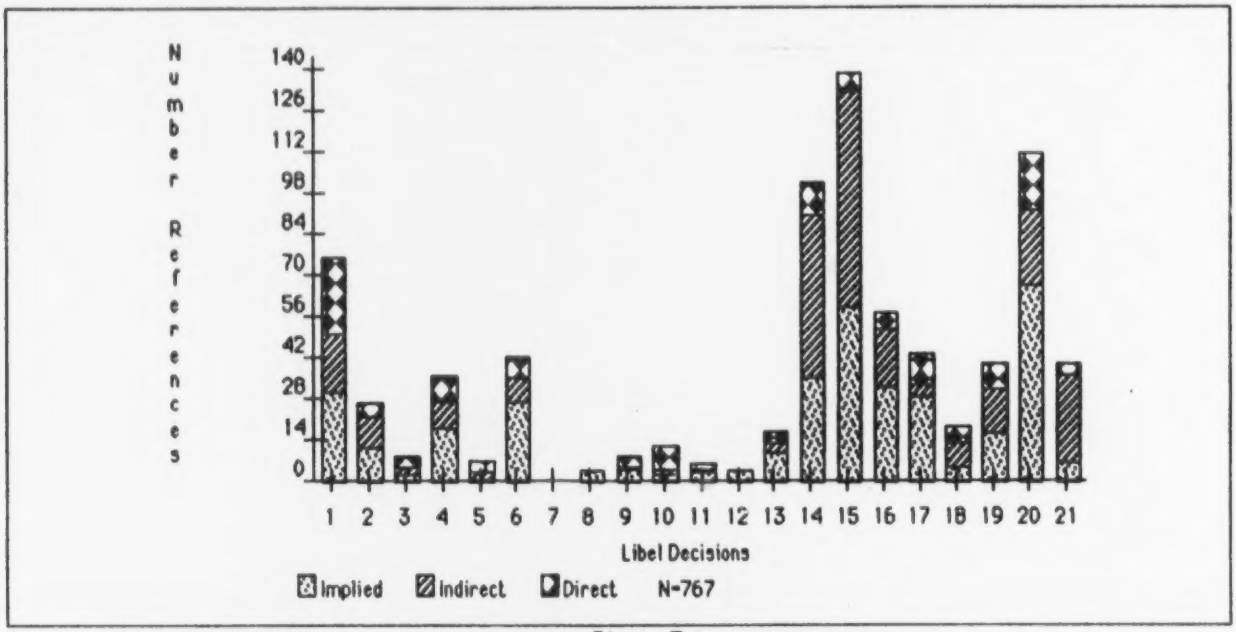

Figure 5
Total References to Public Opinion by Case

D. *Majority, Concurring and Dissenting Opinions*

Professor Thomas Marshall found that substantially more direct mentions of public opinion are found in majority opinions than in dissents. This study found that the total number of mentions in opinions for the Court in libel cases are greater than the number of mentions in dissents and concurrences, but the mentions in

majority opinions do not constitute a clear majority (see Figure 6). Mentions in opinions for the Court numbered 367, or 47.8% of the total mentions; mentions in dissents numbered 244, or 20.3%; and mentions in concurrences followed at 156, or 31.8%, for a total of 767.

When libel cases are examined individually, references in majority opinions tend to outnumber references in dissents. The most notable exceptions begin in 1974 with *Gertz* (case 15), which limited application of the *New York Times* actual malice standard. After *Gertz,* references in dissenting opinions often

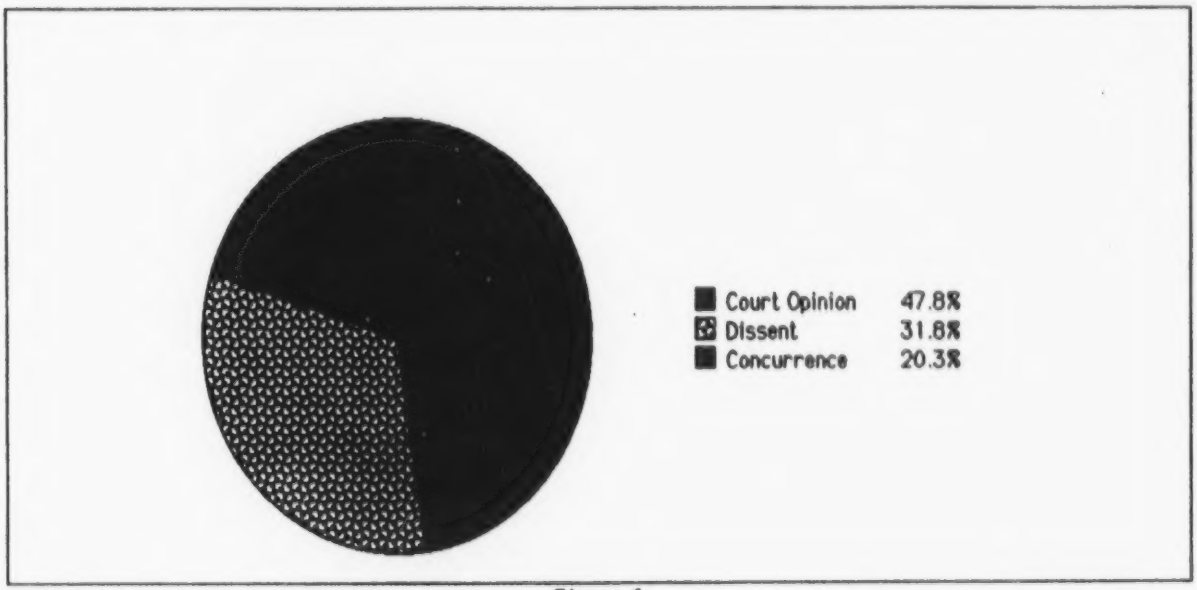

Figure 6
Majority/Dissent/Concurrence Share of Mentions of Public Opinion

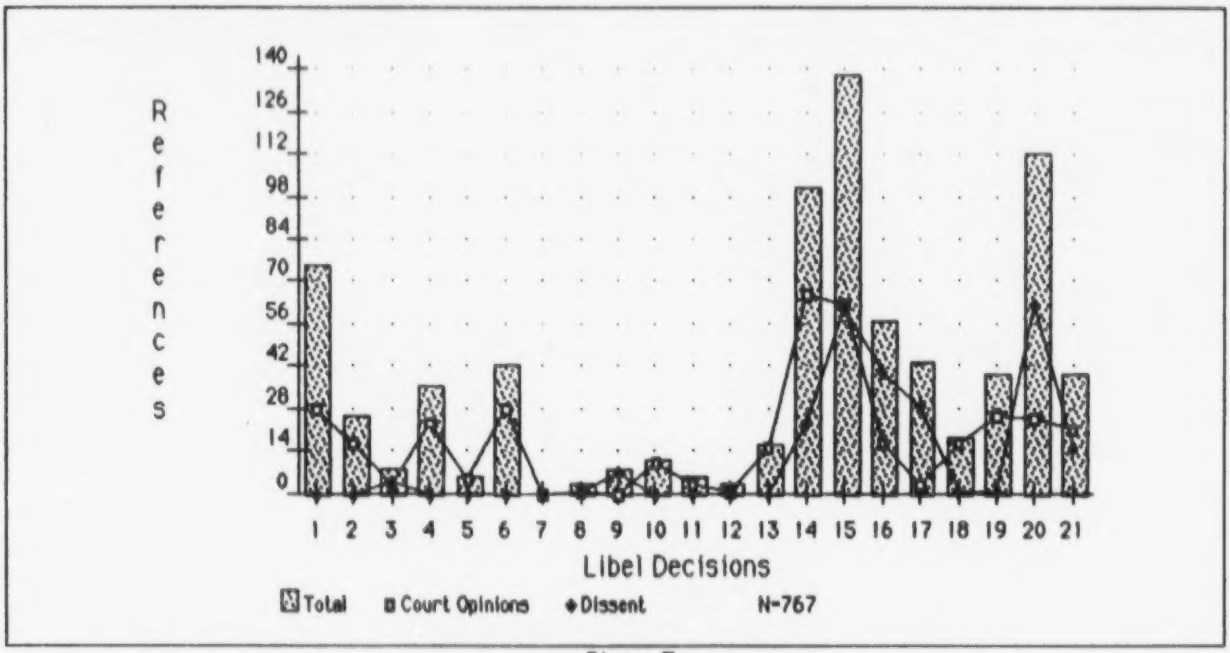

Figure 7
Total References to Public Opinion by Case
With Majority Opinions and Dissent

outnumbered references in majority opinions. For many of these cases, much of the discussion concerned applying *New York Times* to public and private plaintiffs involved in matters of public concern. This is especially true in *Dun & Bradstreet* (case 20), where Brennan's dissenting opinion holds several references in support of the public interest standard. The number of references to public opinion are emphasized in majority opinions once again when a public interest standard is applied to establishing falsity in *Philadelphia Newspapers* (case 21). Figure 7 depicts how the opinions for the Court and the dissents compared with total mentions case by case.

Once a justice's mention of public opinion was identified as direct, indirect, or implied, the mention was categorized under a judicial theory of public opinion. The twenty theories so identified are examined next.

IV. JUDICIAL THEORIES OF PUBLIC OPINION

Two hypotheses were predicted for this study. First, that the common law of libel was constitutionalized and remains under constitutional safeguards because some forms of speech or action inform and influence public opinion and so should be protected. This is M1, Marshall's first judicial theory of public

opinion.[129] The second hypothesis was that some jury verdicts in libel actions intrude on constitutional rights and so are instances of Marshall's fourth judicial theory of public opinion,[130] which is M4, that sometimes public opinion poses a threat to constitutional rights.

Overwhelming support was found for M1, in the twenty libel opinions that mentioned public opinion. Of the 767 mentions of public opinion identified, 322 were found in the justices' reasoning in support of M1. An additional 50 mentions of M1 were identified as background for other reasoning, for a total of 372 mentions of public opinion under the M1 theory. This is 48.5% of the total mentions of public opinion.

Also as predicted, support was found for M4, Marshall's fourth judicial theory of public opinion,[131] that public opinion in some instances poses a threat to constitutional rights. This support is not nearly as substantial as the support found for M1. Of the 767 total mentions, seventeen were mentioned in support of the M4 theory: two were mentioned in dicta or as background, and one was mentioned in arguement against M4 in the context of that case. The twenty mentions under M4 represent only 2.6% of the total mentions.

In addition, support was found for M3, a third judicial theory of public opinion identified by Marshall that law and policy should reflect changing public opinion.[132] Thirteen mentions were identified in support of this theory, three as background, and one was in argument against the theory in the context of that case. The seventeen mentions under M3 represent only 2.2% of the total mentions.

No mention was found in any of the libel opinions to support Marshall's second theory--that elected officials and public opinion adequately protect constitutional rights so that judicial review is not necessary.[133] Thus, three of the four Marhall theories found support in the mentions of public opinion by the Sureme Court in libel opinions.

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[129] Marshall, *supra* note 90 at 36-37.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] This is likely so because of the Court's acceptance of the well established doctrine of judicial review: that the Court is authorized by the Constitution to determine whether laws by the people's representatives and verdicts reached by juries can stand. It is also likely because the Court constitutionalized the common law tort of libel in the seminal case for this study, *New York Times v. Sullivan*.

A. *Seventeen Additional Judicial Theories of Public Opinion in Libel*

In addition to three of Marshall's theories, the justices' reasoning included seventeen more theories of how public opinion is considered in libel opinions.[134] The seventeen theories follow:[135]

1. Libel Theories of Public Opinion

Libel 1 (L1): Some forms of speech unfairly or unduly expose an individual to hostile or otherwise negative public opinion, and therefore must be restricted. This is one of many ideas behind the common law of libel; a common law paradigm[136] of libel.

Libel 2 (L2): The state's interest in shielding an individual's reputation from negative public opinion (L1) and the constitutional interest in protecting speech that informs public opinion (M1) are competing interests that must be balanced.

Libel 3 (L3): The balance between protecting an individual from negative public opinion and protecting speech that informs public opinion is determined by whether the speech involves a matter of public or general interest or concern (answers L2).

Libel 4 (L4): Some forms of defamatory speech unduly degrade or inflame public opinion and therefore must be restricted (this is one of the ideas behind seditious libel when defamation is aimed at government).

Libel 5 (L5): The more access to public opinion a libel defendant had when making a defamatory statement, the more constitutional protection is afforded. (Argued as apparent in majority's reasoning and rejected.)

2. Access Theories of Public Opinion

Access 1 (A1): Individuals have a right of access to media channels in order to reach public opinion.

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[134] In only three instances did the justices mention public opinion outside the context of a theory.

[135] Numerical titles do not reflect any order in a hierarchy of theories. They were numbered as they were encountered in the study.

[136] Paradigm is used in the sense of an umbrella theory, encompassing and giving rise to specific or refining theories.

Access 2 (A2): Individuals and institutions with access to public opinion have a responsibility to communicate truthful information.

3. Public Figure Theories of Public Opinion

Public Figure 1 (PF1). Some individuals have such power and influence on public opinion that they need less protection from defamatory speech (all-purpose public figure; answers L2).

Public Figure 2 (PF2). Some individuals have greater access to channels of communication that reach public opinion and therefore need less protection from defamatory speech (answers L2).

Public Figure 3 (PF3). Individuals involved in issues that affect public opinion warrant less protection from defamatory speech regarding those issues (limited-purpose public figure; answers L2).

Public Figure 4 (PF4). Individuals who either involuntarily or voluntarily become involved in a public controversy in a way that attracts public opinion need less protection from defamatory speech regarding that controversy (Argued as apparent in lower courts' reasoning and rejected.)

4. Public Official Theory of Public Opinion

Public Official 1 (PO1). Public opinion renders some individuals in the hierarchy of government employees as public officials for purposes of libel law because they appear to have substantial responsibility for and control over the conduct of governmental affairs.

5. First Amendment Theories of Public Opinion

First Amendment 1 (FA1). The First Amendment protects public opinion from authoritative opinion.

First Amendment 2 (FA2). The First Amendment prohibits government from interfering with the communication process through which public opinion is formed.

First Amendment 3 (FA3). The First Amendment fosters public opinion's central role in self-government (constitutional paradigm).

First Amendment 4 (FA4). The First Amendment assures the people's right of access to ideas that inform public opinion.

6. Public Opinion Paradigm of Democracy

Will of the People (W1). Public opinion as the will of the people is the essence of self-government (paradigm of democracy).

B. *A Model of Public Opinion in Libel*

The twenty judicial theories can be arranged hierarchically as shown in Figure 8. The theories are not numbered according to their hierarchical position in the model. In this model of judicial theories of public opinion, the theories are arranged in three trunks representing three main values in United States law: constitutional values unique to our system of government, democratic values of a republican democracy, and common law values inherited from English law. Four of the theories identified in this study and one identified by Marshall are designated as paradigm theories representing the three basic values in libel law.[137]

The democratic paradigm of public opinion in the model is W1, the idea that public opinion as the will of the people is the essence of self-government.[138]

The constitutional paradigm of public opinion in the model is FA3, the idea that the First Amendment protects the role of public opinion in self-government. Standing between the constitutional paradigm and the democratic paradigm is M4, the theory identified by Marshall that public opinion can be a threat to

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[137]A model by its nature is an arbitrary visualization of complex concepts; a framework for understanding those concepts. The basis for the construction of the model was the results of the study.

[138]Although W1 may well be a paradigm of democracy, the other two trunks of the model are obviously fragmentary and are paradigms in terms of libel law.

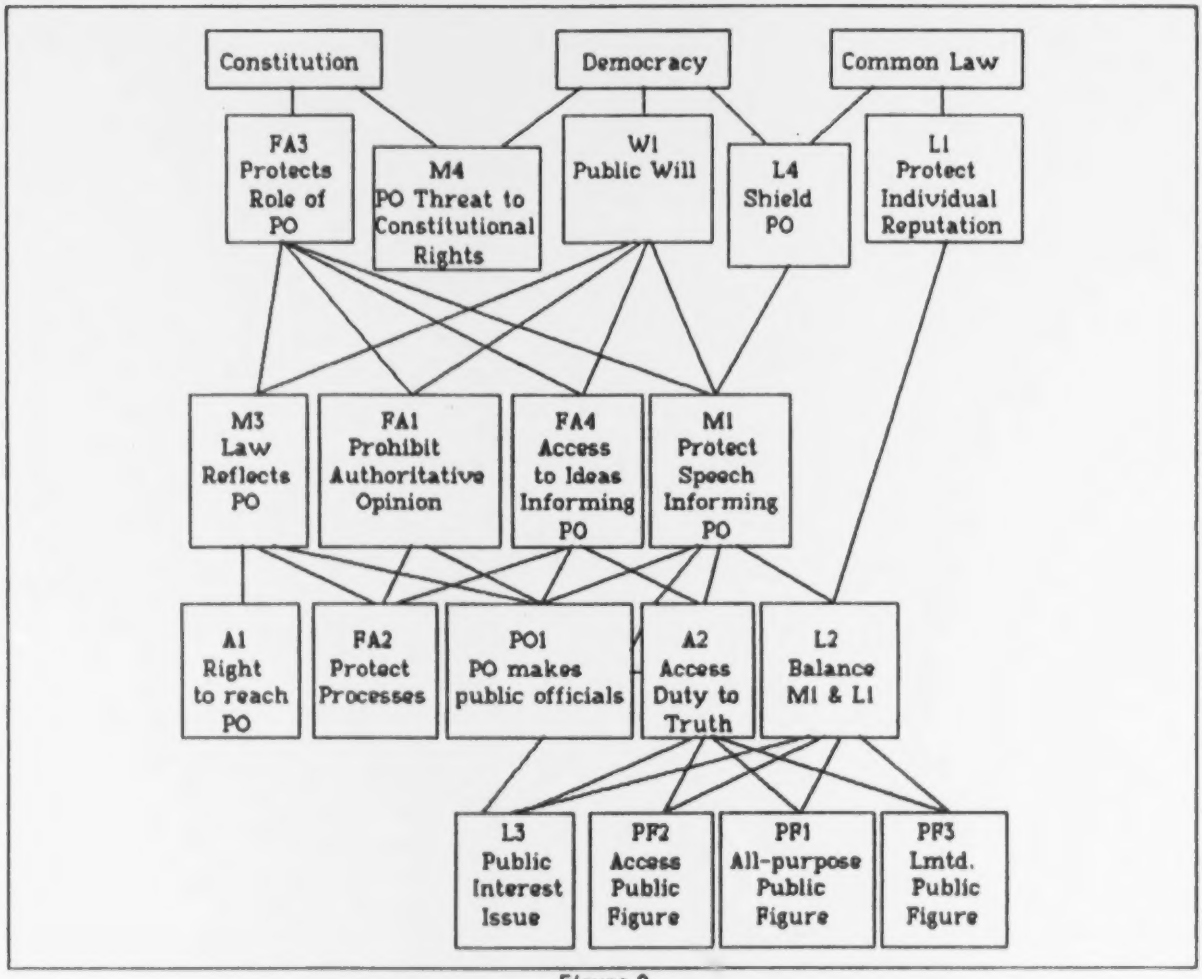
Constitution
Democracy
Common Law
FA3 Protects Role of PO
M4 PO Threat to Constitutional Rights
W1 Public Will
L4 Shield PO
L1 Protect Individual Reputation
M3 Law Reflects PO
FA1 Prohibit Authoritative Opinion
FA4 Access to Ideas Informing PO
M1 Protect Speech Informing PO
A1 Right to reach PO
FA2 Protect Processes
PO1 PO makes public officials
A2 Access Duty to Truth
L2 Balance M1 & L1
L3 Public Interest Issue
PF2 Access Public Figure
PF1 All-purpose Public Figure
PF3 Lmtd. Public Figure

Figure 8
Model of Judicial Theories of Public Opinion in Libel

constitutional rights. This is the original justification for judicial review and the basis by which jury decisions are overturned.[139]

Two common-law paradigms of public opinion in libel law compete with the other branches of the model. The first is L4, the notion that public opinion must be shielded from certain speech, which is an idea

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[139]The constitutional paradigm of the model probably derives from the acquiesence of the people, who are sovereign, to constitutional law. Since the media are inextricably tied with the people and with public opinion, completing the model in other areas of media law may help us understand how the Supreme Court decides media cases and perhaps how it justifies its own province of judicial review.

behind seditious libel. The second is L1, the idea underlying the common law tort of libel that society has an interest in protecting individual reputations from the harmful effects of public opinion.[140]

Eleven of the theories identified in this study and two identified by Marshall are shown in the model as deriving from these five paradigms. (Two theories, L5 and PF4 are not included in the model because they were never seriously considered by the justices who offered them as inherent in the faulty reasoning of either the dissent or lower courts, respectively.)

The first-level libel paradigm competes with the democratic and constitutional values, creating a need for a balancing theory (L2) between common law interests of libel (L1) and constitutional values (M1). Much of the discussion in the twenty-five years since *New York Times v. Sullivan* has centered around establishing a fulcrum for this balancing theory.

M1--the theory identified by Marshall that some speech that informs public opinion should be protected--is at a secondary level in the model. M1 derives from all three paradigms: democratic principles, constitutional values, and common law values. Four of the theories identified are refinements of M1 and explain how M1 is applied in libel. They are at the lower level of the model, and their relationship is competetive because they derive from a theory of libel (L2) which requires that common law interests be balanced with constitutional values. These four theories are L3, the public interest issue theory; and the three public figure theories: PF2, a public figure is someone with access to channels of communication theory; PF1, the all-purpose public figure theory; and PF2, the limited purpose public figure theory.

The second-level theory, FA4--that the First Amendment assures the people's right of access to ideas that inform public opinion--dervies from FA3, the constitutional paradigm of the model and W1--the democratic paradigm of the model. It is limited by the competing common law value of L4, which would shield public opinion from some speech. Marshall's theory M3, that law should reflect evolving public opinion, derives from the constitutional paradigm FA3 and the democratic paradigm W1. FA1, the theory that the First Amendment protects public opinion from authoritative opinion derives from the constitutional paradigm.

These second-level theories--FA1, M3, and FA4--effect the third level theories. The third-level theories are A1, that individuals have a right of access to media channels that reach public opinion; FA2, that

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[140]The common law tort of libel probably derives from a principle associated with a judge's authority (derived from the Crown) to settle conflicts and keep the peace.

the First Amendment prohibits the government from interfering with those communication processes; PO1, that public opinion renders some government employees as public officials for libel law purposes (hence, criticism about them receives more First Amendment protection); and A2, that individuals with access to public opinion have a responsibility to communicate truthful information (this particular theory is a descendent of L4 as well, since it contains an element of L4's common law notion of protecting public opinion from some kinds of speech--in this instance nontruth). A2, the access duty theory, affects the lower-level theories that were formulated in response to L2, the idea that M1 and L1 must be balanced.

The balancing theories--L3, the public interest standard; PF2, the theory that a public figure is someone with access to channels of communication; PF1, the all-purpose public figure theory; and PF2, the limited purpose public figure theory--all recognize an interest in protecting only truthful speech, while allowing some "breathing room" for error. If a negligence theory of public opinion had been articulated (one was not identified in this study), it probably would have shared this level of the model, with influence from A2, the access duty theory.

The twenty judicial theories of public opinion are keyed in Table 4 to correspond with Figures 9 through 14. Table 4 shows the number of references made to each of the twenty theories. The distribution of the 764 mentions of public opinion over the twenty theories is depicted in Figure 9. Because nearly half of the justices' mentions of public opinion are in the context of M1, the distribution of the other fifty-two percent of the mentions can be more easily discerned in a graph (Figure 10) without the skew of M1. The frequency of the references to public opinion includes mentions in support of and in argument against theories, and as background in reasoning on other issues. Figure 11 shows the relative frequency of mentions in support of theories and the total number of mentions relative to majority and dissenting opinions. Figure 12 shows the frequency of mentions of the theories in majority opinions and whether the mentions were in support of, in argument against, or as background for the theories.

Table 4
Key to Judicial Theories

Key	Theory	Mentions	Key	Theory	Mentions
1.	M1	372	11	W1	9
2	M3	17	12	PF1	15
3	M4	20	13	PF2	20
4	L1	43	14	PF3	60
5	L2	17	15	PF4	9
6	L3	114	16	P01	2
7	L4	28	17	FA1	2
8	L5	9	18	FA2	6
9	A1	7	19	FA3	8
10	A2	3	20	FA4	3

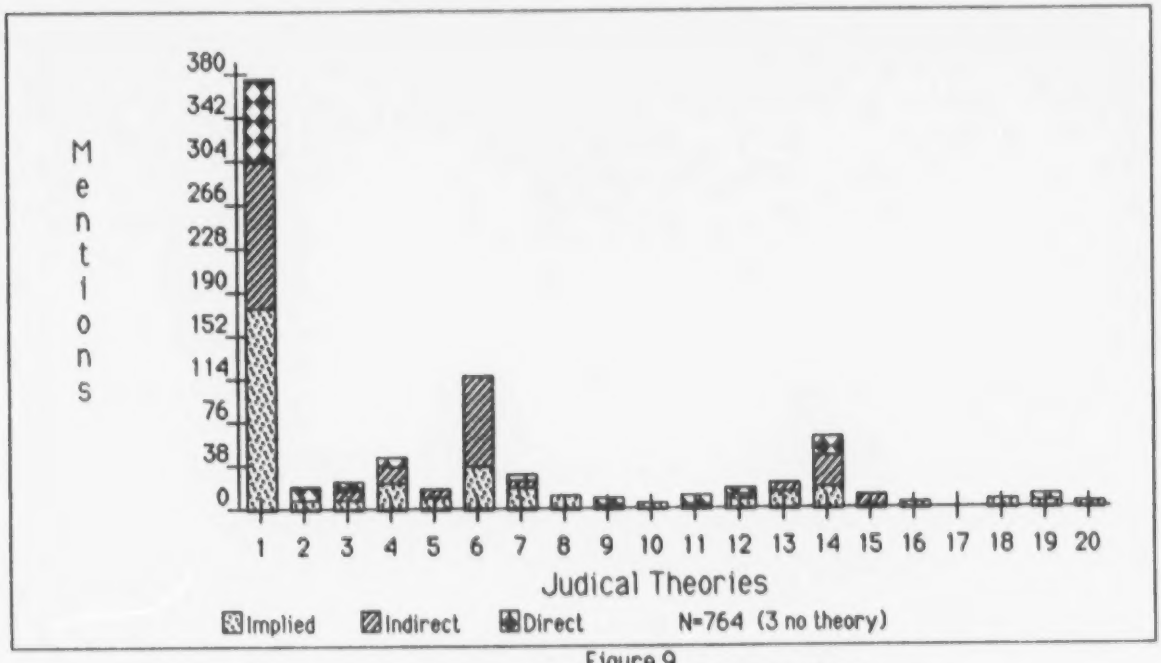

Figure 9
Frequency of Judicial Theories of Public Opinion

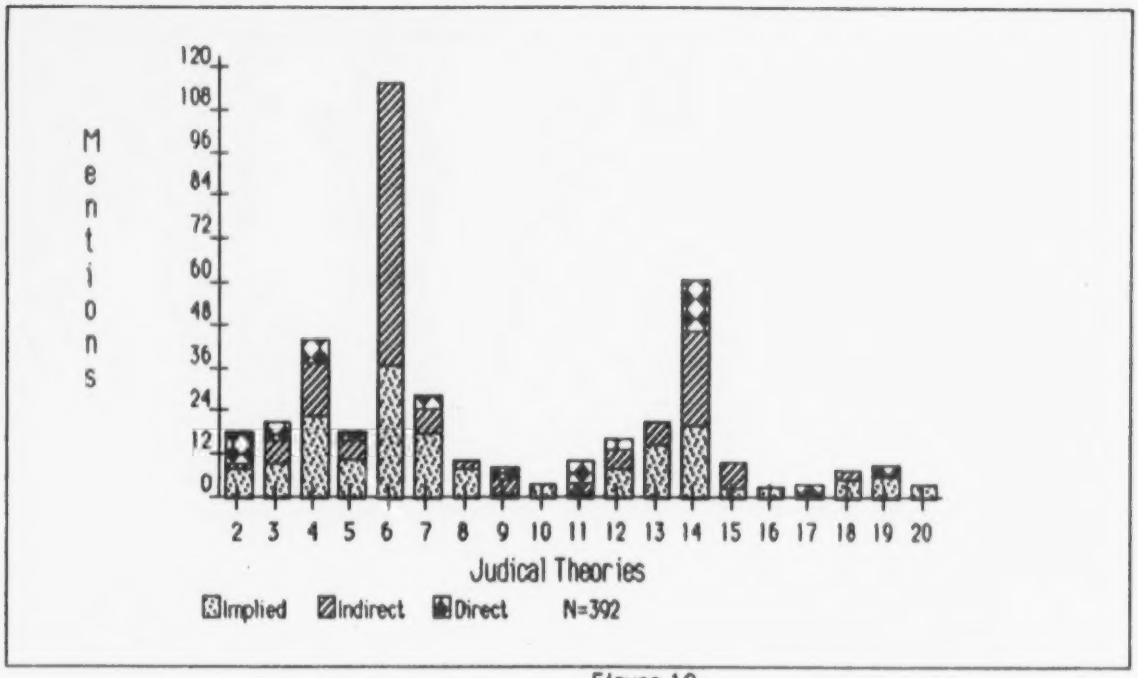

Figure 10
Frequency of Nineteen Judicial Theories of Public Opinion (Without M1)

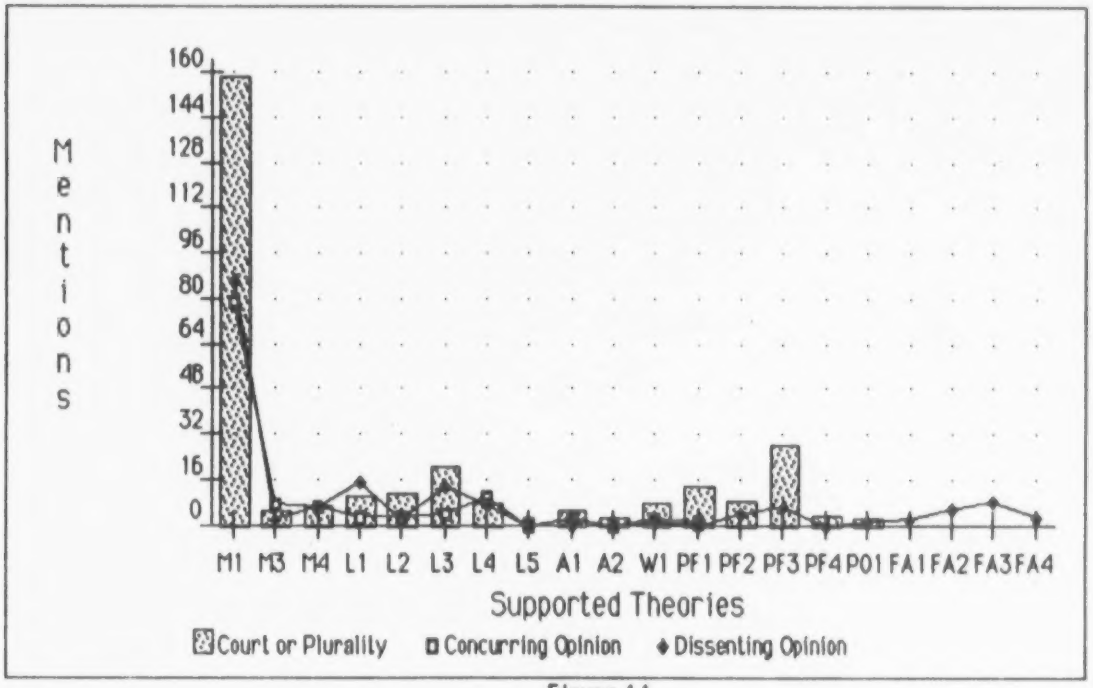

Figure 11
Supported Theories

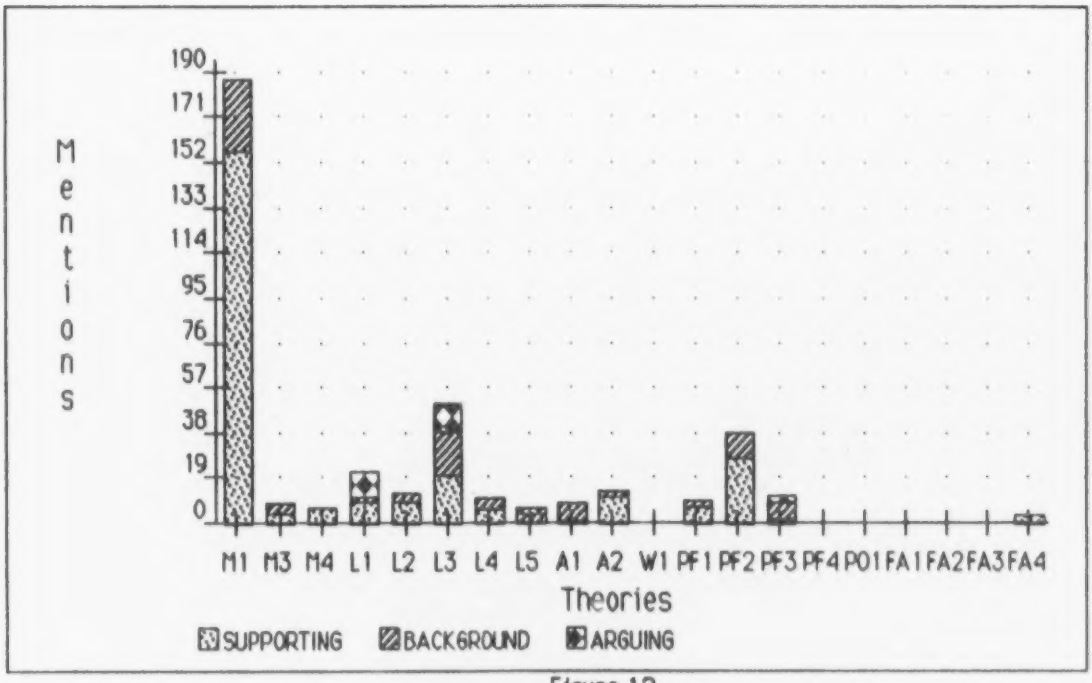

Figure 12
For-the-Court or Plurality Opinions

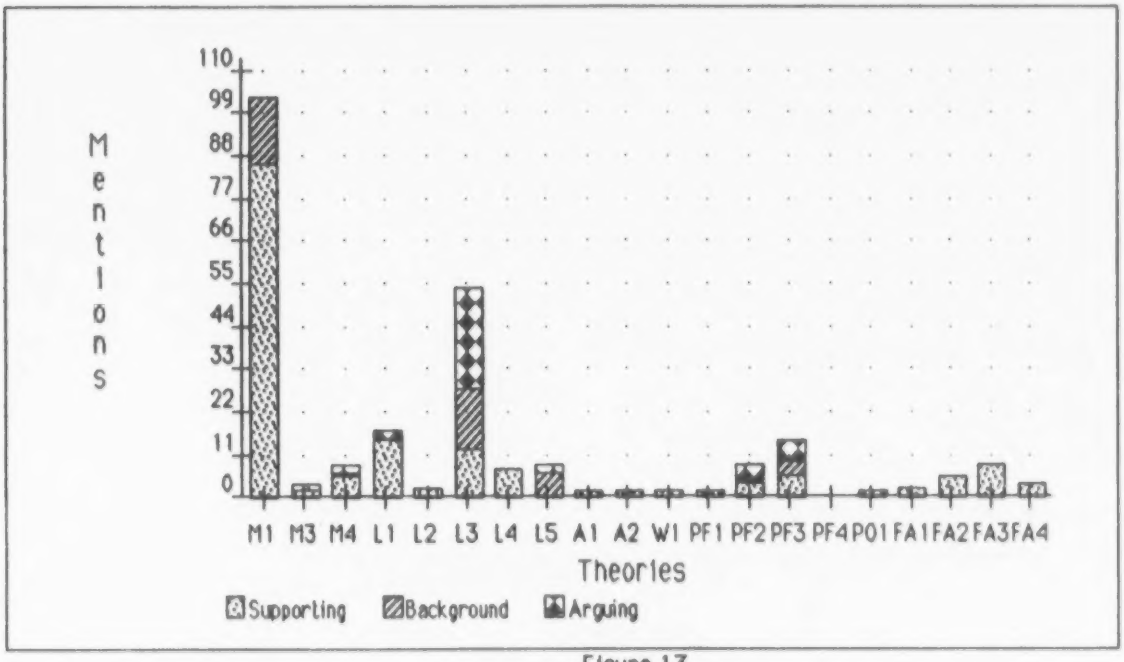

Figure 13
Dissenting Opinions

Because dissenting opinions have the potential for becoming the rule of law as the Court evolves, Figure 13 shows the frequency of mentions in dissenting opinions and whether the mentions were made in support of, argument against, or as background for other reasoning.

C. *The Libel Theories of Public Opinion*

1. The Public Interest Theory

After M1, the justices discussed Libel 3 (L3) more than any other theory in the twenty-one libel opinions studied. L3 is the public interest theory for determining the balance between protecting an individual's reputation and protecting an informed public opinion The public interest theory was discussed in eleven of the twenty-one cases for a total of 114 mentions, or nearly fifteen percent of the total 767 mentions.

Thirty-seven of the 114 mentions referring to the public interest theory of libel were made in support of the theory. The public interest theory was presaged in *Sweeney v. Patterson*,[141] which Justice William Brennan quoted in *New York Times*

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information.[142]

This quote is a foundation for the public interest theory and it derives from M1, the theory that speech that informs public opinion should be protected. The model shows how protection of speech defaming government employees who are perceived as public officials gets its protection directly from M1 and other constitutional values without need of L2, the theory balancing M1 with libel interests. This suggests that the public interest theory offers more protection to speech than L2, which only states the two competing interests of M1 and L1 must be balanced. This is so, if one accepts that there is a presumption of weight attached to the constitutional values in the second level of the constitutional trunk of the model. If the model is correct, the two theories deriving more directly from the constitutional values expressed in the model--P01, the public official theory, and L3, the public interest theory--benefit from this presumption. The other theories derving from M1 do not have this same presumption, as they derive only from L2--the recognition of the need to balance

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[141] 76 U.S. App. D.C. 23-24, 128 F.2d 457-458 (1942).

[142] 376 U.S. at 272, omission in original. (This is an example of an implied mention of public opinion when taken in context. The last sentence in this quote is classified as an indirect mention supporting M1.)

constitutional values in M1 with common law values in L1. Justice Brennan developed the public interest theory with its presumption of constitutional protection in subsequent cases, and he never abandoned it.

The L3 theory has emerged again and again in libel law, eventually becoming the standard for balancing constitutional values with common law libel values for a time when it was accepted by a plurality in *Rosenbloom v. Metromedia*.[143] Brennan wrote:

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[M1]
>
> . . . It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. . . .[L3] In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, [L3] albeit leaving the delineation of the reach of that term to future cases.[144]

However, leaving the delineation of the public interest standard to future cases worried Justice Thurgood Marshall as he dissented in *Rosenbloom*.

In the next libel case considered, *Gertz v. Welch*,[145] the Court rejected this public interest theory as a standard for applying the *New York Times* actual malice burden of proof to libel plaintiffs. Much of the discussion surrounding the public interest theory in *Gertz* and in many of the cases that followed were in argument against L3. Public opinion was mentioned forty times as background statements about this theory (neither in support, nor in argument against it), and the theory was mentioned thirty-seven times in argument against it.

In his opinion for the *Gertz* Court, Justice Lewis Powell agreed with Justice Marshall that the public interest standard would force "judges to decide on an *ad hoc* basis which publications address issues of 'general

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[143] 403 U.S. 29 (1971).

[144] *Id.* at 43-45. (The first sentence of this quote is an example of a direct reference to M1. The two sentences which refer to a matter of public or general interest and an issue of public or general concern are classified as two separate, indirect mentions in support of L3.)

[145] 418 U.S. 323 (1974).

or public interest' and . . . 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges."[146] Powell added:

> The "public or general interest" test [{L3}] for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood [L1] that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest [{L3}] may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.[147]

The public interest standard was applied by the Court again in a libel action brought by a private plaintiff, *Philadelphia Newspapers v. Hepps*.[148] But this time the standard was applied to the issue of falsity. In her opinion for the 5-4 Court, Justice Sandra Day O'Connor wrote:

> In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, *we believe that the Constitution requires us to tip them in favor of protecting true speech*. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.[149]

Justice O'Connor makes it clear that speech about matters of public concern should share the presumption of protection that L3 brings from the constitutional values from which it derives.

2. Earlier Libel Theories

a. *Libel 1.*

The public interest theory derives from the struggle to balance the common law libel theory of public opinion, L1, with the constitutional and democratic values expressed in several of the theories identified in this study.

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[146] *Id* at 346, citing *Rosenbloom*, 403 U.S. at 79.

[147] 418 U.S. at 346. (The above quote contains two indirect and one implied mention of public opinion in argument (deonated by { }) against L3, and one indirect mention in support of L1.)

[148] 475 U.S. 767, 106 S.Ct. 1558 (1986).

[149] 106 S.Ct. at 1564, emphasis added.

L1 is the theory that some forms of speech unfairly or unduly expose an individual to hostile or otherwise negative public opinion and therefore must be restricted. This is one of the concepts fundamental to defamation law. In the common law tort of libel, defamation includes injurious speech that may only be seen or heard by a third party--just one other individual. L1, in contrast, embraces only those mentions that refer to injurious speech that reaches public opinion. The emphasis is on the protection of individual reputation from public opinion.

An example of a direct reference to the libel paradigm L1 is Justice Brennan's description of the Alabama law of libel:

> Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust. . . ."[150]

This mention was offered as background in the Court's reasoning that the defamatory speech (L1) in *New York Times* was constitutionally protected because it informed public opinion (M1).

Overall, the justices discussed public opinion in the context of the common law paradigm, L1, for a total of forty-three mentions, or 5.6% of the total 767 mentions. Seven of those mentions were offered as background. Twenty-seven mentions in four of the cases studied, beginning with *Rosenbloom,* supported the libel paradigm.

In his dissent in *Rosenbloom,* arguing vigorously against the public interest standard, Justice Marshall wrote in support of L1: "The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation."[151]

Of all the justices, Justice Byron White most supported the common law libel theory L1. In his dissent in *Gertz,* Justice White complained that the impact of *Gertz* on the traditional law of libel would be to make recovery impossible, even with *prima facie* proof of a libel defamation. The plaintiff would have to show

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[150] In New York Times, 376 U.S. at 267, parenthetical in original.

[151] 403 U.S. at 79. (This is an example of an implied mention of public opinion under L1.)

a higher degree of culpability on the part of the publisher. And, "recovery for loss of reputation will be conditioned upon 'competent' proof of actual injury to his standing in the community."[152] White contended:

> Recovery under common-law standards for defamatory falsehoods about a private individual, who enjoyes no "general fame or notoriety in the community," who is not "pervasive[ly] involve[d] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," is simply not forbidden by the First Amendment. . . .
>
> I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media.[153]

White believed that limiting state libel laws would stifle public debate. He wrote, "It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themsleves with social problems."[154] Limiting libel laws would also endanger a person's privacy, White said. "While some risk of exposure 'is a concommitant of life in a civilized community,' the private citizen does not bargain for defamatory falsehoods."[155]

Only nine mentions of public opinion were made in argument against the libel paradigm L1. In his dissent in *Gertz*, Justice Brennan argued against the application of L1 in the context of that case. His reasoning included indirect references to public opinion in support of M4 (that public opinion sometimes poses a threat to constitutional rights). Justice Brennan wrote

> "The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. . . . [M4] But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. [M4] Moreover, the Court's broad-ranging examples of 'actual injury,' including impairment of reputation and standing in the community, [(L1)] as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views [M4] a formidable weapon for doing so." Finally, even a limitation of recovery to 'actual injury'--however much it reduces the size or frequency of recoveries--will not provide the necessary elbowroom for First Amendment expression.[156]

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[152] 418 U.S. at 376.

[153] *Id* at 399, paranthetical in original.

[154] *Id* at 400.

[155] *Id* at 402.

[156] *Id* at 367.

Seven of the nine arguments against L1 were made in *Rosenbloom* by Justice Brennan as he argued for the public interest standard L3. He wanted L3, with its weight for constitutional values, to be the fulcrum in balancing the common law interests of L1 and the constitutional interests of M1, protecting speech that informs public opinion.

b. *Libel 2.*

The idea that the competing interests of common law values and constitutional values should be balanced is expressed in the second libel theory, L2. It is developed in Justice Brennan's opinion for the Court in *Rosenblatt v. Baer*:[157]

> This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation.[158]

Brennan, of course, finds in his public interest theory fruition for the idea that the two competing interests must be balanced.

Overall, the L2 theory is supported in fifteen mentions and offered as background in two mentions, for a total of seventeen mentions, or 2.2% of the total mentions. No justice argued against this theory.

c. *Libel 4.*

The fourth libel theory of public opinion (L4) identified in this study is that some forms of defamatory speech must be restricted because they degrade or inflame public opinion. This idea is not new and, in fact, is one idea behind the old criminal law of seditious libel. As background in *Garrison v. Louisiana*,[159] Justice Brennan's opinion for the Court explained how the idea is narrowly applied today:

> The [American Law Institute] Reporters therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace, such as the statute sustained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, or designed to reach speech, such as

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[157] 383 U.S. 75 (1966).

[158] *Id* at 86.

[159] 379 U.S. 64 (1964).

> group vilification, "especially likely to lead to public disorders," such as the statute sustained in *Beauharnais v. Illinois*, 343 U.S. 250.[160]

This shows that the L4 theory still has application in the model, although it is restricted by constitutional and democratic values. The *New York Times* actual malice standard does not protect some speech that falls in the context of L4. In an implied reference to this theory, Brennan wrote:

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[161]

Justice White has expressed concern with the negative impact of false defamations when the public figure cannot prove knowing or reckless falsehood. He wrote in *Dun & Bradstreet v. Greenmoss Builders*:[162]

> Absent such proof [of knowing or reckless falsehood], there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . .
>
> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; [L4] and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods. . . . [L1][163]

L4 is supported in twenty-three mentions and offered as background in four mentions. It is refuted outright only once, by First Amendment absolutist William O. Douglas. In an implied reference to the theory, Justice Douglas in *Garrison* quoted a legal scholar's contention that seditious libel was "entirely the creation of the Star Chamber,"[164] which "stifled criticism of the government and freedom of political opinion."[165]

d. *A fifth libel theory.*

Justice Brennan offers the final libel theory of public opinion (L5) as an explanation for the Court's decision in *Dun & Bradstreet*. In his dissent Brennan wrote that the majority seemed to be saying that the more access to public opinion a publication (and hence a defamatory statement) has, the more constitutional

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160 *Id* at 70.

161 *Id* at 75, citations omitted.

162 472 U.S. 749 (1984).

163 *Id* at 767-769.

164 379 U.S. at 83.

165 *Id*, n. 4.

protection it should be afforded. Brennan was arguing that the *New York Times* standard should apply to the Dun & Bradstreet publication of credit reports just as it applied to publications with larger circulations. He wrote:

> Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows.[166]

In an implied reference to the theory, Brennan expounded:

> Justice Powell also relies in part on the fact that the expression had a limited circulation and was expressly kept confidential by those who received it. Because the subject matter of the expression at issue in this case would clearly receive the comprehensive protections of *Gertz* were the speech publicly dissemi-nated, this factor of confidential circulation to a limited number of subscribers is perhaps properly understood as the linchpin of Justice Powell's analysis. . . .
>
> This argument does not save the analysis. The assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979).[167]

The L5 theory is offered as background in seven mentions and refuted in two, all in *Dun & Bradstreet*, and all by Brennan.

3. The Public Official Theory

The public official theory (P01) is the idea that some government employees are considered public officials by the public because of their perceived power in governmental affairs. Because of this perception in public opinion, these governmental employees in libel law are subjected to the same *New York Times* actual malice burden of proof as public officials. This theory of public opinion is closely tied to democratic and constitutional values in the model because it is apparently derived from the value that the people have a right to monitor and criticize their officials. The people may monitor governmental employees whom they perceive to have governmental power, so more constitutional protection is afforded to this part of the process. In the model, the public official theory is afforded direct constitutional protection without help from L2, which balances common law interests of individual reputations (L1) and constitutional interests in speech that informs public opinion (M1).

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[166] 472 U.S. at 782.

[167] *Id* at 795, n. 18.

The public official theory finds expression in two cases, *Rosenblatt* and *Firestone*. In his opinion for the Court, Justice Brennan wrote that Baer, a supervisor of a county-owned recreation area, should be considered a public official even though he was not an elected official. Brennan reasoned:

> It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[168]

4. The Public Figure Theories

According to PF1, some individuals have such power and influence on public opinion that they need less protection from defamatory speech. PF1 is mentioned 15 times; thirteen mentions were in support of the theory and two were offered as background in other reasoning. No mention was made to refute this theory.

Most communication law scholars recognize two public figure plaintiffs, the all-purpose plaintiff idenitified by the PF1 theory and the limited-purpose plaintiff identified by PF3. The characteristic that these two plaintiffs share with each other and with public officials is expressed by PF2. This is the theory that some individuals have greater access to channels of communication that reach public opinion and therefore need less protection from defamatory speech. PF2 was mentioned twenty times; fourteen in support, three as background, and three in argument against the theory in the context of the particular case.

After M1 and the public interest theory (L3), the theory that is next in frequency of total mentions of public opinion is PF3--the idea that individuals who work to influence public opinion in particular issues need less protection from defamatory speech regarding those issues. This theory identifies the limited-purpose public figure mentioned above. PF3 is discussed in six opinions for a total of sixty mentions: forty-three supporting the theory, thirteen as background, and four in argument against it in the context of the particular case.

All three public figure theories are discussed in *Curtis Publishing Co. v. Butts*,[169] a badly fractured opinion that combined two libel actions. The one common ground of *Curtis* on which a majority of the justices could agree was that the two plaintiffs of the original libel suits were public figures because of their involvement in matters affecting public opinion. Both "commanded a substantial amount of independent public

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[168] 383 U.S. at 85.

[169] 388 U.S. 130 (1967).

interest at the time of the publications."[170] Wally Butts, athletic director of the University of Georgia, "attained that status by position alone [PF1]"[171] because of "public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular. . . ."[172] Walker, the second libel plaintiff, attained that status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy. . . . [PF3]"[173] The *Curtis* Court noted that both Butts and Walker "commanded sufficient continuing public interest and had sufficient access to the means of counterargument [PF2] to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."[174]

The idea that the advantage public officials and public figures have over private individuals is self-help articulated in PF2 is developed further in *Gertz*. In his opinion for the Court, Justice Powell explained, "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[175]

Powell explains that public figures under the PF1 theory are individuals who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." More common are the public figures under the PF3 theory who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[176] Because public figures "invite attention and comment".they have voluntarily exposed themselves to increased risk of defamatory falsehoods.[177]

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170 *Id* at 154.

171 *Id* at 155.

172 *Id* at 146.

173 *Id* at 155.

174 *Id*, quoting from *Whitney v. California*, 274 U.S. 357, 377.

175 418 U.S. at 344.

176 *Id* at 345.

177 *Id*

The PF3 theory was presaged in *Rosenblatt v. Baer* (case 4) in Brennan's opinion for the court:

> We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standard--for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern.[178]

The idea of the voluntary nature of attracting public attention is developed further in *Time Inc. v. Firestone,*[179] a libel action growing out of an inaccurate report of the final judgment in the divorce of Russell and Mary Firestone. In his opinion for the Court, Chief Justice William Rehnquist explained

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portions of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interest in court." . . . She assumed no "special prominence in the resolution of public questions."[180]

Even though Mary Alice Firestone employed a publicist and held press conferences regarding her sensational divorce, the Court found that she was not a voluntary participant in the resolution of a public issue. The press conferences "should have no effect upon the merits of the legal dispute . . . or the outcome of the trial. . . ."[181] Participating in litigation does not automatically render someone a public figure, the Court said. "And while participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others."[182]

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[178] 383 U.S. at 86 n. 12.

[179] 424 U.S. 448 (1975).

[180] *Id* at 454-455 [citation omitted, paranthetical in original]. *But see* Justice Marshall's dissent at 489 that questions the Court's "heavy emphasis on the degree to which Mrs. Firestone attempted to 'influence the resolution of' a particular controversy." Marshall contends *Gertz* did not attempt to establish a requirement that an individual attempt to influence the resolution of a particular controversy before he can be termed a public figure. If that were the rule, Athletic Director Butts . . . would not be a public figure."

[181] *Id* at 455.

[182] *Id* at 457.

One other public figure theory of public opinion, PF4--the unwilling or involuntary public figure, was noted, and summarily rejected, by Chief Justice Rehnquist in his opinion for the Court in *Wolston v. Reader's Digest*.[183] Here Rehnquist presented all three public figure theories of public opinion developed in *Gertz, Curtis Publishing* and *Firestone*. Then Rehnquist noted the district court had held that the petitioner was a public figure under PF3 "for the limited purpose of comment on his connection with, or involvement in, Soviet espionage in the 1940s and 1950s."[184] This decision was based on the plaintiff's failure to appear before a grand jury, which involved him "in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage."[185] The lower court's holding that Wolston was a public figure, Rehnquist said, creates the theory that individuals who voluntarily *or involuntarily* become involved in a public controversy in a way that attracts public opinion need less protection from defamatory speech regarding that controversy. But Rehnquist argued that Wolston had been "dragged unwillingly into the controversy. The Government pursued him in its investigation."[186] Media attention does not define public figure status. Rehnquist continued

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today.[187]

Public opinion in the context of PF4 is mentioned nine times, all by Rehnquist and all in *Wolston*. Two mentions describe the theory, and seven refute it.

5. The Access Theories

a. *Access 1*

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[183] 443 U.S. 157 (1979).

[184] *Id.* at 165.

[185] *Id.*

[186] *Id.* at 166.

[187] *Id.* at 167.

A commonality of the public figure and the public official is their access to public opinion. This idea is expressed in PF2, and it is expressed in two more access theories.

First is the idea that individuals have a right of access to media channels to reach public opinion (A1). Second is the idea that individuals and institutions with ready access to public opinion have a responsibility to communicate the truth (A2).

Among the libel cases studied, a right of access to media channels is first discussed by Justice Goldberg's concurring opinion in *New York Times*. In a direct mention of public opinion, Goldberg discussed the importance of an advertisement like the one at issue as a channel of communication to the people. He wrote:

> And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes [A1] will be greatly diminished.[188]

This access theory is developed further by Justice Brennan in *Rosenbloom*. In his plurality opinion, Brennan argued for a public interest standard rather than "an as yet undefined class of 'public figures'"[189] to determine when *New York Times* actual malice would apply. Since public figure plaintiffs were set apart from private plaintiffs because of their access to channels of communication, then the solution was to assure the same access to all. Brennan wrote:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[190]

Brennan also noted that some states had adopted right-of-reply statutes and that "the First Amendment itself should be read to guarantee a right of access to the media. . . ."[191]

Six mentions are made of public opinion in support of the access theory A1, and one is made as background. This background mention was made in argument against interfering with the editorial process. In

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[188] 376 U.S. at 300.

[189] 403 U.S. at 46.

[190] *Id.* at 47.

[191] *Id.*, n. 15, citing Barron, *Access to the Press--A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

Herbert v. Lando,[192] Justice Brennan noted that a Florida statute granting a right of reply (access) was struck down by the Court in 1974 in *Miami Herald Publishing Co. v. Tornillo*[193] "as undue interference with the editorial process."[194]

b. *Access 2.*

Interference with the editorial process and other limitations on press freedom was justified with A2, the theory that those with ready access to the media that reach public opinion have a responsibility to the truth. In an implied mention of public opinion in *Herbert*, Justice Byron White argued for A2. White's opinion for the Court asserts that editorial discussion and judgment would not be endangered if the exchanges between reporters and their editors were subject to scrutiny by defamation plaintiffs. White said *New York Times* made it essential that the plaintiff focus on the state of mind of the defendant to determine if the defendant knew or had reason to suspect the publication was false. Direct inquiry of "those who expect public dissemination of their remarks"[195] is necessary to prove "awareness of probable falsehood." Implied in White's remarks is the assumption that those "who expect public dissemination of their remarks" have a responsibility to the truth, and thus have no privilege that shields them from inquiries into their state of mind to determine awareness of probable falsehood. This theory is discussed only three times.

6. The First Amendment Theories

All four of the First Amendment theories are stated in Justice Brennan's dissent in *Herbert*: first, that the First Amendment protects public opinion from authoritative opinion (FA1); second that the First Amendment prohibits government from interfering with the communication process through which public opinion is formed (FA2); third, that the First Amendment fosters public opinion's central role in self-government (FA3); and fourth, that the First Amendment assures the people's right of access to ideas that inform public opinion (FA4).

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[192] 441 U.S. 153 (1979).

[193] 418 U.S. 241.

[194] 441 U.S. at 190.

[195] *Id* at 173, n. 22.

Brennan states three of the First Amendment theories in implied references to public opinion in the following passage:

> In its instrumental aspect, the First Amendment serves to foster the values of democratic self-government [FA3]. This is true in several senses. The First Amendment bars the state from imposing upon its citizens an authoritative vision of truth [FA1]. It prohibits the state from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government [FA2]. And the Amendment shields those who would censure the state or expose its abuses [M1].[196]

Then quoting *Cohen v. California*,[197] Brennan elaborated:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each us [FA1], in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . . [FA3][198]

And quoting Alexander Meiklejohn, Justice Brennan added that the principle that free speech is necessary to self-government [FA3] "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage [W1]."[199]

The "social values served by the First Amendment"[200] support FA4, which Brennan describes as embodied in earlier decisions: "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,"[201] and "the circulation of information to which the public is entitled. . . ."[202]

All contained within *Herbert*, Justice Brennan mentioned the First Amendment theories as follows: FA1 (prohibiting authoritative opinion), two mentions; FA2 (protecting the processes of communication), six

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196 *Id.* at 184-185.

197 403 U.S. 15, 24 (1971).

198 441 U.S. at 184, n. 1.

199 *Id.* at 185 n.3, citing POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 27 (1965).

200 *Id.* at 188.

201 *Id.*, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

202 441 U.S. at 188, quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

mentions; FA3 (the paradigm that the First Amendment fosters the role of public opinion in self-government), eight mentions; and FA4 (that the First Amendment assures access to ideas) three mentions.

The model places the First Amendment theories at three levels. The paradigm FA3--that the First Amendment fosters public opinion's central role in self-government--is at the highest level. It engenders FA1, that public opinion is protected from authoritative opinion, and FA4, that the First Amendment assures the people's right to access of ideas. Both FA1 and FA4 are at the second level of the model where they (along with M3 and M1) empower the public official theory and the constitutional theory, FA2, that the First Amendment prohibits government from interfering with the communication processes that form public opinion. The model (and Justice Brennan) suggest there is tension between FA2, protecting access, and A2, that access to media channels imparts a responsibility to the truth that may result in a state-of-mind inquiry of a media defendant. A2 is used to justify encroaching on the editorial process, although FA2 implies this would strain constitutional protections.

7. The Will of the People

The constitutional branch of the model is linked in several ways with the democratic branch. The paradigm of the democratic branch is W1--the will of the people is the essence of self-government. W1, the democratic paradigm, was introduced earlier in a discussion of the only two instances in which the exact term "public opinion" is used.[203] W1 occurs first in Justice Goldberg's concurring opinion in *New York Times*: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion."[204]

Justice Potter Stewart offered the next direct mention of this theory, in his opinion for the Court in *Greenbelt Publishing Assn. v. Bresler*:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.[205]

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[203] *See infra*, note 115.

[204] 376 U.S. at 304, n. 5, quoting Justice Black in Bar v. Matteo.

[205] 398 U.S. 6, 11 (1969), quoting Stromberg v. California, 283 U.S. 359, 369 (omission in *Greenbelt*).

W1 is offered as a paradigm over several of the theories, including Marshall's M1 (that certain speech should be protected because it informs public opinion) and M3 (that law should follow evolving public opinion. That public opinion is the essence of self-government is the *raison d'etre* of constitutional protections for speech. This paradigm is supported by a total of nine mentions, five of which are direct mentions and six of which are in opinions for the Court.

D. *How the Court Considers Public Opinion*

Virtually all of the justices studied say they are mindful of public opinion. In libel actions, the justices consider public opinion from a variety of angles. The eighteen theories considered in the model can be reduced to three main trunks of how public opinion is considered. First, public opinion is the essence of self-government, and government must heed public opinion (W1, M3). This is the democracy trunk of the model. Second, public opinion and the ideas that form it are protected (FA1, FA2, FA3, FA4, M1). This is the constitutional trunk of the model. And third, individual reputations are protected from undue scrutiny and hostile effects of public opinion (L1), and public opinion is protected from speech that may degrade it (L4). This is the common law trunk of the model. The justices' discussions about public opinion are theoretical, never addressing the issue inherent in their power of judicial review, although they do discuss M4, the idea that public opinion can threaten constitutional rights.

In summary, individual reputations are protected from the scrutiny of public opinion. Speech is protected that informs it. And, while the justices say that government must heed public opinion, they have never indicated in any libel opinion how they themselves respond to the will of the people.

V. The Justices and Public Opinion

A. *The Justices Since* New York Times

Every justice on the Court since *New York Times v. Sullivan*[206] constitutionalized libel in 1964 has mentioned public opinion in some context, usually in the discussion of one of the judicial theories discussed. Although every justice mentioned public opinion,[207] some justices discussed public opinion more than others.

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[206] 376 U.S. 254. Justices Antonin Scalia and Anthony Kennedy, appointed by President Reagan in 1986 and 1987, respectively, had not yet written a libel opinion at the time of this study.

[207] The justice identified as having written an opinion for the Court is credited in this study as the author of that opinion, and the theories mentioned within Court opinions are credited to that justice.

When all seventeen of the justices who wrote the opinions examined in this study are considered as a unit, public opinion was mentioned an average of 36.5 times per case. When the mentions of only the current justices are counted, however, the average falls to 29.9 mentions per case. The retirement of Lewis Powell contributed significantly to this decline. Justice Powell averaged twenty-two mentions per case, having mentioned public opinion a total of eighty-eight times in the four opinions he wrote. A breakdown of the justices' total and average mentions are presented in Table 5. The justices are numbered in the order in which they appear as authors of opinions in the chronological list of cases.

In total number of mentions for a single justice, Justice William Brennan, the author of *New York Times*, significantly leads all other justices, both on the current Court and throughout the twenty-five-year history of that landmark decision. Brennan mentioned public opinion 299 times in the twelve opinions he wrote, for an average of 24.9 mentions per opinion.Although Brennan wrote more libel opinions than any other justice on the current Court, that fact alone does not account for his dominance in the discussion of public

Table 5
Justices' Mentions of Public Opinion

	Justice	Aver./Opinion	Total Mentions	Number Opinions
1.	Brennan*	24.9	299	12
2.	Black	2.1	25	12
3.	Goldberg	12.5	25	2
4.	Douglas	7.5	30	4
5.	Clark	1.5	3	3
6.	Fortas	1.0	3	3
7.	Stewart	4.4	31	7
8.	Warren	12.0	12	1
9.	White*	6.9	62	9
10.	Harlan	10.5	42	4
11.	Marshall*	12.7	38	3
12.	Powell	22.0	88	4
13.	Blackmun*	6.0	12	2
14.	Rehnquist*	21.0	42	2
15.	Burger	6.3	19	3
16.	O'Connor*	21.0	21	1
17.	Stevens*	15.0	15	1
*Current		29.9	479	16
Total		36.5	767	21

* Indicates those justices serving on the current Court.

opinion. One other justice, Hugo Black, wrote as many libel opinions as Brennan during his tenure. Although both Brennan and Black wrote twelve opinions, Black made only twenty-five mentions of public opinion, for an average of 2.08 per opinion.

The current justices who come closest to Brennan's average mentions per opinion are Chief Justice William Rehnquist and Justice Sandra Day O'Connor, who both averaged twenty-one mentions per libel opinion. But Rehnquist had written only two libel opinions at the time of the study, and O'Connor had written one. They are followed by Justice John Paul Stevens, with fifteen mentions in the one libel opinion he had written; Justice Thurgood Marshall, with an average of 12.7 mentions in his three opinions; Justice Byron White, with an average of 6.9 in his nine opinions; and finally Justice Harry A. Blackmun, with an average of six mentions in the two libel opinions he had written at the time of the study.

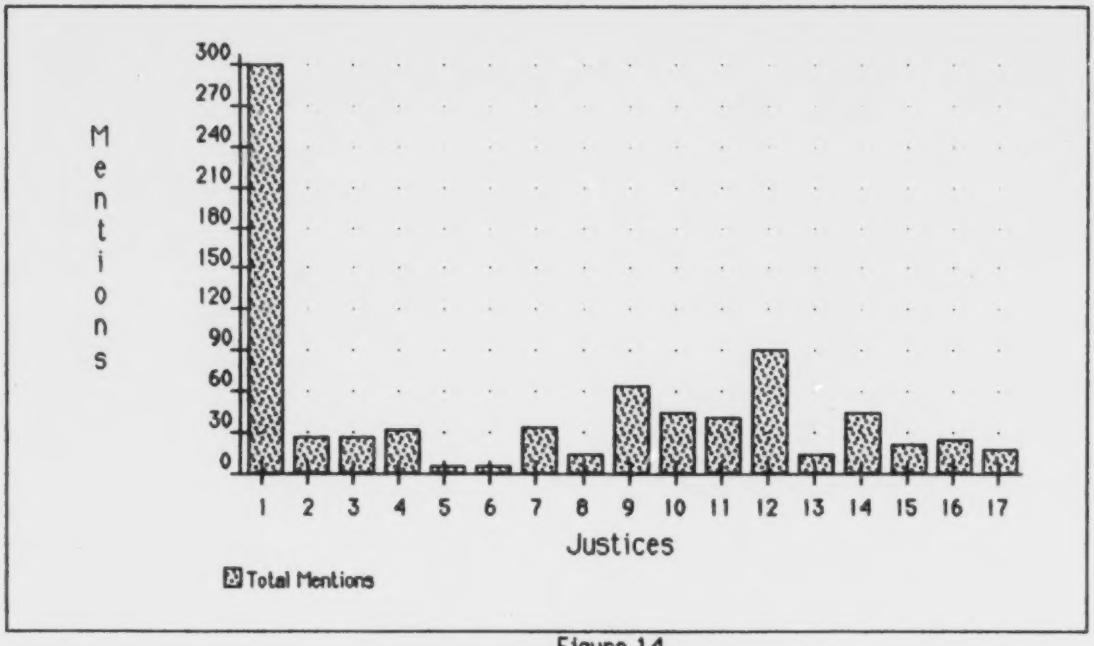

Figure 14
Justices' Total Mentions

Key to Justices: 1--Brennan; 2--Black; 3--Goldberg; 4--Douglas; 5--Clark; 6--Fortas; 7--Stewart; 8--Warren; 9--White; 10--Harlan; 11--Marshall; 12--Powell; 13--Blackmun; 14--Rehnquist; 15--Burger; 16--O'Connor; 17--Stevens.

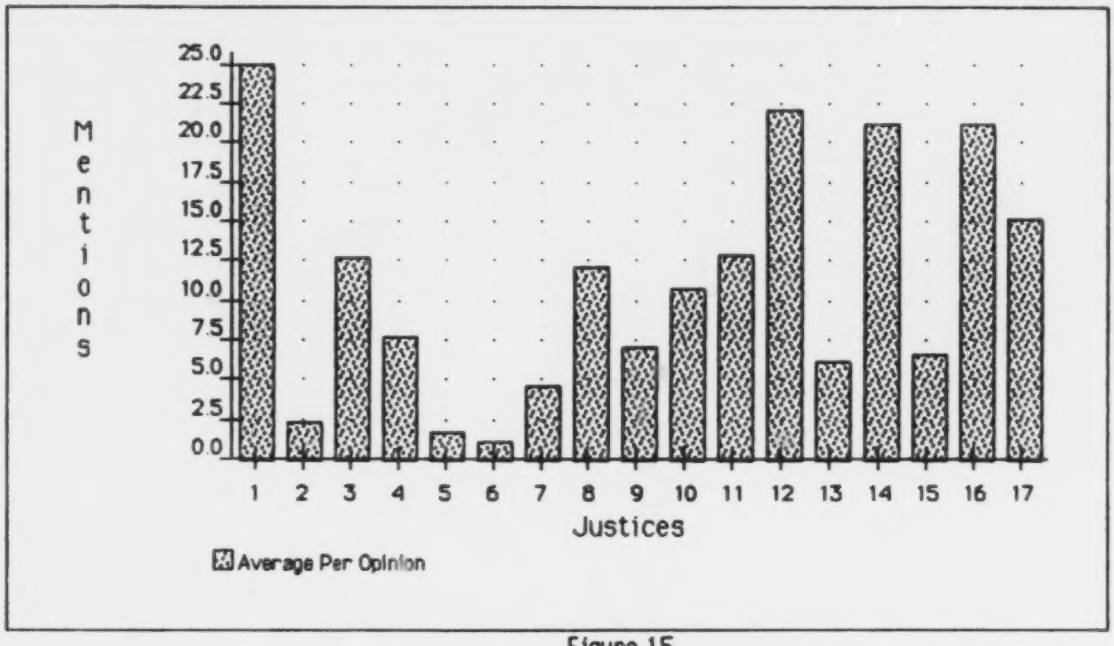

Figure 15
Justices' Average Mentions Per Opinion

Figure 14 is a visualization of the differences among justices in the total number of mentions made in the twenty-one libel cases examined. The dominance of Justice Brennan in mentions of public opinion is

striking, especially when compared to one of the justices who have been on the Court with Brennan throughout the twenty-five-year history of *New York Times*. Justice Byron White is second in the number of opinions written, with nine, yet he mentioned public opinion only sixty-two times.Given his long tenure on the Court and his preeminence as the father of constitutionalized libel, Justice Brennan has had more opportunity to write more libel opinions than most members of the Court. Thus, it may be more relevant to compare the justices' average mentions per opinion. Still, as Figure 15 shows, Brennan leads in average mentions per case with 24.9 in twelve opinions. Justice Brennan is followed closely by Justice Powell with an average per opinion of twenty-two mentions in four opinions, Chief Justice Rehnquist with an average of twenty-one mentions in two opinions, and Justice O'Connor with an average of twenty-one mentions in one opinion.

B. *The Justices and The Judicial Theories*

The following tables (6 through 17) present an overview of the justices' support of individual theories. Only the theories receiving support from more than one justice are presented in the following tables of supporting mentions.

Table 6
Supporting Mentions of
M1--Protect Speech Informing Public Opinion

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	90	1	69	160
2. Black	0	12	8	20
3. Goldberg	0	19	0	19
4. Douglas	0	8	9	17
5. Clark	2	0	0	2
6. Fortas	0	0	2	2
7. Stewart	10	0	0	10
8. Warren	0	8	0	8
9. White	0	11	3	14
10. Harlan	12	0	5	17
11. Marshall	0	0	5	5
12. Powell	29	1	0	30
14. Rehnquist	3	0	0	3
15. Burger	0	1	0	1
16. O'Connor	11	0	0	11
17. Stevens	0	0	3	3
Total	157	61	104	322

Table 7
Supporting Mentions of
M3--Law Should Reflect Public Opinion

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	4	0	2	6
3. Goldberg	0	3	0	3
4. Douglas	1	0	0	1
8. Warren	0	1	0	1
9. White	1	0	0	1
10. Harlan	1	0	0	1
Total	7	4	2	13

Table 8
Supporting Mentions of
M4--Public Opinion As Threat to Constitutional Rights

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	0	0	3	3
2. Black	0	4	1	5
4. Douglas	0	0	2	2
6. Fortas	0	0	1	1
7. Stewart	2	0	0	2
10. Harlan	3	0	0	3
11. Marshall	0	0	1	1
Total	5	4	8	17

Table 9
Supporting Mentions of
L1--Public Opinion as Threat to Individual Reputation

Justice	For-the-Court	Concurring	Dissenting	Total
9. White	0	3	9	12
10. Harlan	0	0	1	1
11. Marshall	0	0	1	1
12. Powell	5	0	0	5
15. Burger	1	0	0	1
16. O'Connor	3	0	0	3
17. Stevens	0	0	4	4
Total	9	3	15	27

Table 10
Supporting Mentions of
L2--Balance Competing Rights of M1 and L1

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	1	0	2	3
3. Goldberg	0	1	0	1
9. White	0	1	1	2
10. Harlan	1	0	0	1
15. Burger	2	0	0	2
16. O'Connor	4	0	0	4
Total	8	2	3	13

Table 11
Supporting Mentions of
L3--Public Interest Issue Standard as Balance for Libel

Justice	For-the-Court	Concurring	Dissenting	Total
. Brennan	17	1	13	31
4. Douglas	0	1	0	1
10. Harlan	2	0	0	2
12. Powell	1	0	0	1
16. O'Connor	2	0	0	2
Total	22	2	13	37

Table 12
Supporting Mentions of
L4--Restrict Speech that Degrades Public Opinion

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	2	0	0	2
5. Clark	1	0	0	1
7. Stewart	0	1	0	1
9. White	1	10	5	16
10. Harlan	1	0	0	1
12. Powell	1	0	0	1
17. Stevens	0	0	2	2
Total	6	11	7	24

Table 13
Supporting Mentions of
A1--Right of Access to Public Opinion

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	5	0	0	5
3. Goldberg	0	1	0	1
Total	5	1	0	6

Table 14
Supporting Mentions of W1--
Public Opinion is the Essence of Self-Government

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	3	0	1	4
3. Goldberg	0	1	0	1
4. Douglas	0	2	0	2
7. Stewart	3	0	0	3
Total	6	3	1	10

Table 15
Supporting Mentions of PF1--
Those with Influence Over Public Opinion Need Less Protection

Justice	For-the-Court	Concurring	Dissenting	Total
8. Warren	0	1	0	1
10. Harlan	2	0	0	2
12. Powell	3	0	0	3
14. Rehnquist	5	0	0	5
15. Burger	2	0	0	2
Total	12	1	0	13

Table 16
Supporting Mentions of PF2--
Those with Access Need Less Protection

Justice	For-the-Court	Concurring	Dissenting	Total
8. Warren	0	1	0	1
10. Harlan	1	0	0	1
11. Marshall	0	0	3	3
12. Powell	2	0	0	2
13. Blackmun	0	3	0	3
14. Rehnquist	1	0	0	1
15. Burger	3	0	0	3
Total	7	4	3	14

Table 17
Supporting Mentions of PF3--
Those Influencing Public Opinion in An Issue Need Less Protection

Justice	For-the-Court	Concurring	Dissenting	Total
1. Brennan	1	0	0	1
8. Warren	0	1	0	1
10. Harlan	3	0	0	3
11. Marshall	0	0	5	5
12. Powell	6	0	0	6
13. Blackmun	0	8	0	8
14. Rehnquist	15	0	0	15
15. Burger	2	0	0	2
Total	27	9	5	41

C. *The Judicial Model of Public Opinion in Libel*

Placing the justices's records on the judicial-theory model creates a visualization of the support given over the past twenty-five years in libel opinions. The model also shows a shift of support on the Court. This model is depicted in Figure 16.

Key to Current Justices: BR--Brennan; WH--White; MA--Marshall; BN--Blackmun; RE--Rehnquist; O'C--O'Connor; SV--Stevens.

Key to Former Justices (shadowed by a dot screen): BK--Black; GO--Goldberg; DO--Douglas; CL--Clark; FO--Fortas; SW--Stewart; WA--Warren; HA--Harlan; PO--Powell; BU--Burger.

Key to the Theories in the Model.

Top level. From the top left of the model, the paradigms are:
FA3--The First Amendment fosters public opinion's central role;
M4--Public opinion sometimes threatens constitutional rights;
W1--Public opinion is the essence of self-government;
L4--Speech that degrades public opinion may be restricted;
L1--Speech that harms individual reputation may be restricted.

Middle Level. The theories deriving from the paradigms
FA1--The First Amendment protects public opinion from authoritative opinion;
M3--Law should reflect public opinion;
FA4--The First Amendment assures access to ideas.
M1--Speech that informs public opinion should be protected.

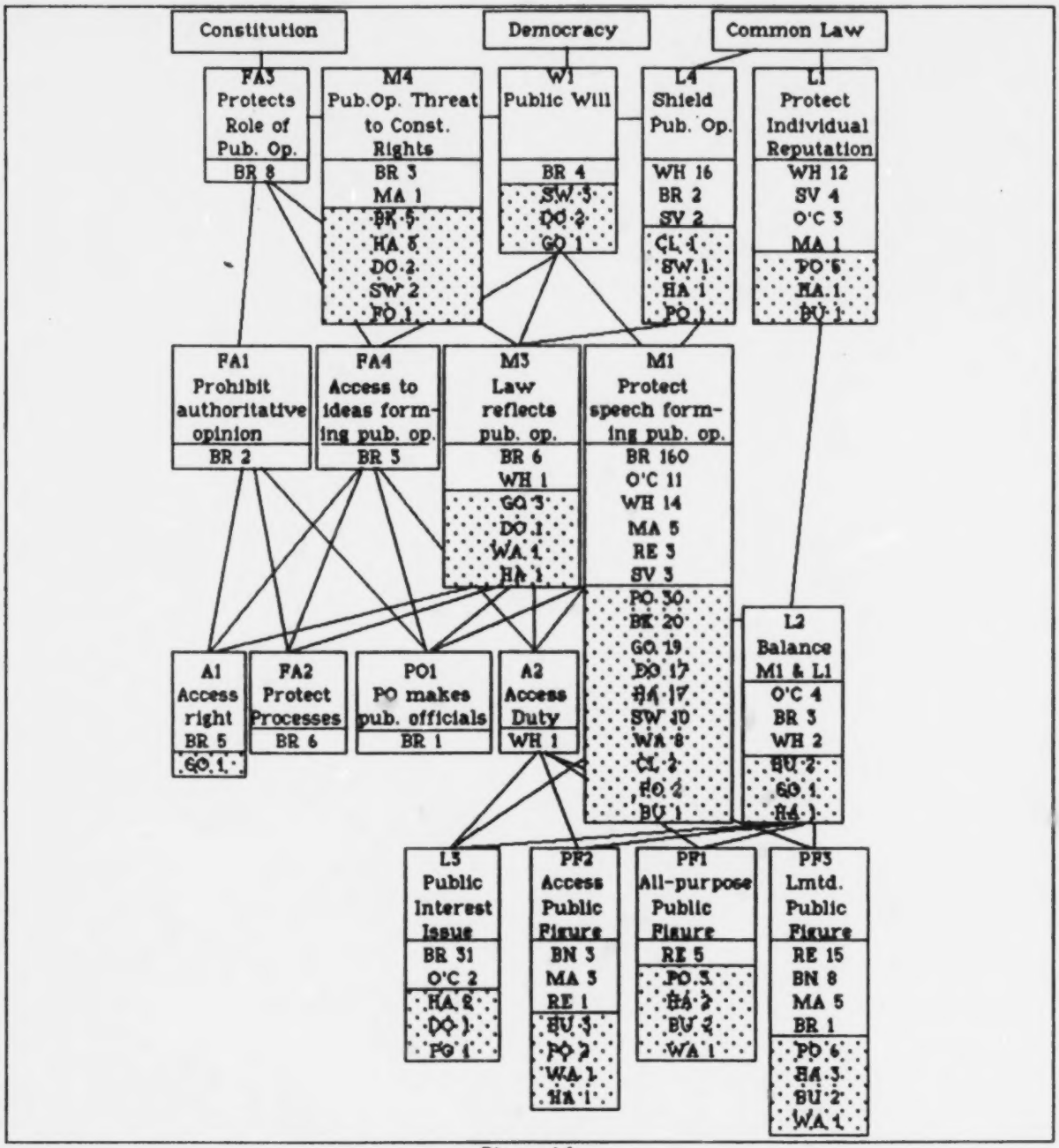

Figure 16
Model of Judicial Theories of Public Opinion

Third Level. The theories deriving from the secondary theories:
A1--People have a right to reach public opinion;
FA2--The First Amendment protects media processes from government interference;
PO1--Public opinion makes some government employees public officials;
A2--People with access have a responsibility to truth;
L2--L1 (protecting reputation) and M1 (protecting speech) must be balanced.

Lower Level. Compromise theories deriving from the competing interests in the third-level theories.
L3--The balance between L1 and M1 is a public-interest standard;
PF2--People with access to public opinion need less protection from defamatory speech;
PF1--People with general influence over public opinion need less protection; and
PF3--People who try to influence public opinion in a particular area need less protection.

D. *Trends Since* New York Times.

The most striking shift in the Court's articulated support for particular theories is from the democratic side of the model to the common law side in three categories. The loss of three former justices' records leaves Justice Brennan alone in articulated support of the democratic paradigm (W1). This theory was supported in opinions written by former Justices Stewart, Douglas, and Goldberg.

In M4--the theory that public opinion is a threat to constitutional rights --Brennan is accompanied in articulated support only by Justice Marshall. This was a theory invoked by five former justices, usually in reference to juries reflecting the attitudes of their communities. Former Justices Black, Harlan, Douglas, Stewart, and Fortas mentioned public opinion in support of this theory.

Brennan is left with White in articulated support for M3, the idea that law and policy should reflect changing public opinion. This theory had been supported in opinions by Justices Goldberg, Douglas, Warren, and Harlan.

In other areas of the model, the justices's articulated support for M1 remains strong. All of the justices but Blackmun mentioned public opinion in the context of the theory that speech that informs public opinion should be protected. Of those sixteen justices, six remain on the bench. All ten of the former justices mentioned M1. Six of them had ten or more mentions. Former Justice Powell was second in overall mentions with thirty.

While Justice Brennan lost the support of Justices Harlan, Douglas, and Powell in the public interest theory, L3, he gained the support of Justice O'Connor. This apparent stability is upset by the numerous mentions of other justices in argument against this theory.

Support appears stable for the theory that access to public opinion is a distinguishing characteristic shared by public figures and public officials (PF2). Three current justices have articulated support the theory; four supporting justices have been lost. Support for the limited-purpose public figure has remained stable at four justices left on the Court and four lost.

The public-figure theory that appears most affected by the loss of former justices is the all-purpose public figure theory supported by Chief Justice Rehnquist. The loss of former Justices Powell, Harlan, Burger, and Warren left Rehnquist alone in this category.

VI. CONCLUSION

Virtually all of the justices studied say they are mindful of public opinion. The justices' discussions of public opinion in libel opinions, however, are theoretical. The Court has not considered the merits of using public opinion polls as evidence of defamation nor as indicators of how libel cases should be decided. While the justices say that government must heed and protect public opinion, they have not indicated in any of the libel opinions studied how they themselves should respond to the will of the people, except in the context of overturning jury verdicts and legislative acts when those particular indicators of public opinion threaten constitutional values. This is their long-established province of judicial review.

Just as legislation and jury decisions may encroach on the Constitution, the common law, too, often conflicts with Constitutional values. Common law is judge-made law, deriving neither from statutory nor constitutional authority. It is a legal tradition inherited from English law. The tort of libel is inherited from preconstitutional principles in the common law. The justices have been prolific in their discussions of public opinion when they try to balance this area of common law with constitutional values.

The efforts of the justices to balance the common law with constitutional values can be seen in the model of judicial theories of public opinion. The model is divided into three trunks representing the main values in United States law: constitutional values unique to our system of government, the democratic values of a republican democracy, and common law values inherited from England. Five theories of public opinion are paradigms representing these basic values. The model shows where the justices line up in their advancement of democratic, constitutional, or common law ideals.[208] The model also shows that the Court, in terms of the theories the justices have articulated, is shifting from the constitutional and democratic side of the model to the common law side. For example, the idea that law should reflect public opinion has been articulated by six justices since *New York Times;* all but two have left the bench, leaving only Justices William Brennan and

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[208]However, the model only shows which justices have *articulated* support for particular theories, whether in court opinions, concurrences, or dissents. It does not reflect the support for theories created by justices' joining an opinion without comment.

Byron White. Brennan is the sole articulator of support for five constitutional and democratic theories. He is the only justice left on the bench that supports two other theories that were once supported by other justices. One is the democratic paradigm that public opinion as the will of the people is the essence of self-government (W1). Four justices have supported W1, but three of them have left the bench. Goldberg supported A1, the idea that people have a right of access to public opinion, but he has left the bench.

On the constitutional and democratic side of the model, Brennan may be said to have championed L3, the public-interest issue standard of balancing M1, the constitutional principle of protecting speech that informs public opinion, and L1, the common law interest in protecting individual reputation. L3 is placed on the constitutional and democratic side of the model by virtue of its central role in fostering the public debate of issues necessary for effective self-government (W1--the democratic paradigm), a value that the First Amendment was designed to protect (FA 3--the constitutional paradigm). Of the five justices who have articulated support for L3, only Brennan and Justice Sandra Day O'Connor remain on the bench. Many of the justices on the current Court have vigorously argued against L3, which emerges as the most controversial theory in the model. It is worth noting that Justice Marshall--who opposed using the public interest standard to determine when the actual malice burden would apply to defamatory speech--joined O'Connor's *Philadelphia Newspapers v. Hepps* opinion in applying the public interest standard to the issue of falsity. Justice Blackmun--who had first joined Justice Brennan in support of the public interest standard in *Rosenbloom v. Metromedia,* and then abandoned L3 to help create a majority in *Gertz v. Welch*--also joined the *Hepps* majority. The *Hepps* dissenters left on the current Court are Justices Rehnquist, White, and Stevens. These three continued to oppose the public interest standard in libel law and argued instead for the common law notion of protecting individual reputation. Thus, the current Court is split four-three on this extension of the public interest standard. The positions of Justices Scalia and Kennedy are unknown on this issue.

The most evenly supported theory over the past twenty-five years is M1, the idea that some speech that informs public opinion should be protected. Sixteen of the seventeen justices studied have articulated support for this theory. Six of those sixteen remain on the bench. Of the justices studied, only Justice Blackmun never articulated this theory. Again, the positions of Justices Scalia and Kennedy are unknown. Likewise, the idea that M1, the constitutional interest of protecting speech that informs public opinion, and L1, the common law interest of protecting individual reputations from public opinion, are competing values

that should be balanced (L2) has maintained support over the years. Of the six justices who articulated support for this idea, three remain on the bench.

The common law side of the model has maintained articulated support since *New York Times*. For example, the common law notion of a limited public figure (PF3) as a standard for balancing M1 and L1 has had support articulated by eight justices, four of whom are still on the bench. L1 retains strong support. Of the seven justices who supported L1, four are still on the bench. Brennan, who was strong on the constitutional and democratic branches, is absent from the L1 limb. And, he has never articulated support for any of the public figure theories. The only common law theory that appears to have lost support as justices leave the bench is PF1, the all-purpose public figure category. Of the five justices who have articulated support for PF1, only Chief Justice Rehnquist remains on the bench.

The results of this study lends some support to Graglia's contention discussed earlier that the justices's constitutional decisions are not derived from the constitution. Graglia may somewhat overstate this charge, but the model reflects the justices' tendency to use judge-made law--such as the public figure plaintiff theories, which are derived from 1922 judge-made law--to balance constitutional conflicts. In particular, this study finds that many justices on the current court, at least in their libel opinions, articulate more support for common law principles than for constitutional values that conflict with those principles. This would appear so, even though constitutional values are the purported justification for the undemocratic decisions of the court from which there is no appeal.

The Prison Access Cases: Journalism, the Public Sphere, and the Right to Know

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The Prison Access Cases: Journalism, the Public Sphere, and the Right to Know

It is a common and widely held belief in the United States that the news media play an important role in a self-governing society. Whether that belief manifests itself in the idea that the press should serve as a watchdog on government officials or that it should serve to enhance the exchange of information, it seems accepted that the press plays a vital role in the creation of a properly functioning public sphere.[1]

The truth or falsity of that belief can be contested, but there seems to be little doubt that the idea that the press is vital to democracy runs deep in American journalism. As CBS's Dan Rather once defended journalists' right of access to government information:

> (T)he issue is whether we are going to preserve something essential in a democracy: freedom of the press, including the freedom to protect sources of information. This is not for the benefit of reporters. It is for the benefit of listeners and viewers and readers . . .. The cause is America.[2]

The underlying message in such a statement is clear: If democracy is to survive, the press must have a special status. And the best path for democracy to follow is

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1. Borrowing from Jürgen Habermas, public sphere refers to a part of public life where public opinion can be formed without coercion. See Habermas, "The Public Sphere," in Jürgen Habermas on Society and Politics, Steven Seidelman, ed., Boston: Beacon Press (1989): pp. 231-236.

2. Quoted in Tom Bethell and Charles Peters, "The Imperial Press," Washington Monthly, 8 (November 1976): p. 29.

through a public motivated and enlightened by its press. The trouble with Rather's statement is not that it is inherently wrong, but rather that it does not accurately reflect the whole. In many ways, Rather is right. America is living democracy through its press. The important question is more fundamental: Is this the best way for democracy to be achieved?

Grounded in the critical social theory of Jürgen Habermas, this paper will review the relationship between the press and society by looking at a concept that has come to be known as "the right to know."[3] More specifically it will examine, through an analysis of three Supreme Court cases, the attempt by the press in the 1970s to use the right to know to gain access to prison and jails at various levels across the United States. The cases are important not only for establishing the parameters of a right to know in the United States, but also because of the view of society that is put forward by the press and the nation's highest court.

It will also be argued that the consequences of the right to know have been two-fold: The Court by indirectly recognizing special privileges for the press has adopted an interpretation of the First Amendment that effectively puts

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3. Admittedly, the right to know can encompass many different meanings. This paper will primarily deal with two of those definitions: (1) the press should have access to information for the sake of disseminating it to the public, and (2) a more normative definition, where the public should have access to information to make informed decisions about public life.

one group of people above the rest of society, and the Court's action tends to promote the view that members of society are not adequately prepared to enter into a discourse about how to govern themselves.

The Right to Know

The press has often been referred to as the champion of the people, protecting them from the evils of government, big business or both. In many respects, the press exists because of the public. As James Carey notes, the "god term" of journalism is the public.

> Insofar as journalism is grounded, it is grounded in the public; insofar as journalism has a client, the client is the public. The press justifies itself in the name of the public: it exists, or so it is regularly said, to inform the public, to serve as the extended eyes and ears of the public, to protect the public's right to know, to serve the public interest.[4]

It should not be surprising then that it is the press that gives rise to the term "the right to know," all done to further the loosely defined notion of the public's interest. While the concept of a right to know has a long history,[5] the origin of the phrase can be traced to a 1945 speech by

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4. James Carey, "Journalists Just Leave: The Ethics of an Anomalous Profession," Ethics and the Media, Maile-Gene Sagen, ed., Iowa City: Iowa Humanities Board, 1987: p. 13.

5. Some scholars trace the concept to the development of the penny press in the 1830s. See Dan Schiller, Objectivity and the News, Philadelphia: University Pennsylvania Press, 1981. However, others suggest that a concept of "popular enlightenment" can be traced back to the American revolution. See John C. Nerone, "The Mythology of the Penny Press," Critical Studies in Mass Communication, 4 (December 1982): p. 388.

the executive director of The Associated Press, Kent Cooper. Cooper believed that if a right to know, as exercised through the press, had existed on an international basis, World War II might have been avoided.[6] Further support was given to the right in 1953 when the American Society of Newspaper Editors commissioned a study on access to information by Harold L. Cross, titled The People's Right to Know. In a chapter titled "Newspapers as Litigants," it becomes clear that the book does not so much trumpet a public right, but rather a press right. Cross suggests that newspapers fight for the public's right to know because it is through newspapers that the public will benefit. Cross argues that while justifications for denying access to information to the general public can be defended, those justifications cannot hold for the news media.

> The newspaper does not act out of mere or idle curiosity. It is not in competition with the fee status of records custodians. . . . In a manner of speaking, when made by a newspaper, application of the right to inspect tends to circumvent, or at least dilute, the fear that if one citizen or other person be granted such right the rest of the community will march in upon the records, not as single spies but in battalions.[7]

Perhaps a greater justification for the right to know can be found in the social responsibility theory of the press, a theory Jerilyn McIntyre claims provides American

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6. "The Right to Know," The New York Times, Jan. 23, 1945, p. 18.

7. Harold L. Cross, The People's Right to Know, New York: Columbia University Press, 1953: p. 123.

journalism with a philosophical paradigm.[8] The social responsibility theory of the press does more than just provide journalism with a "comforting certainty," as McIntyre puts it, it also canonizes a view of the audience. This view is clear in the words of William E. Hocking, perhaps the intellectual founder[9] of the social responsibility theory:

> We say recklessly that (the public has) "a right to know"; yet it is a right which they are helpless to claim, for they do not know that they have the right to know what as yet they do not know. In a sense, whatever they are told by the efforts of other people is pure gratuity.[10]

For Hocking, people do not know "what they want in any socially reliable way."[11] Theodore Peterson's articulation of social responsibility theory casts further doubt on people's rationality. People potentially and generally are rational, but the theory denies that people are "innately motivated to search for truth."

> Consequently, he is easy prey for demagogues, advertising pitchmen, and others who would manipulate him for their selfish ends.

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8. Jerilyn S. McIntyre, "Repositioning a Landmark: The Hutchins Commission and Freedom of the Press," Critical Studies in Mass Communications, 4 (1987): p. 137.

9. For example, McIntyre argues that Hocking's work set the agenda for the work of the Commission on Freedom of the Press, out of which social responsibility theory grew. In fact, much of the Commission's later work was shaping Hocking's work "into a statement that the others could accept." See McIntyre, p. 143.

10. William E. Hocking, Freedom of the Press: A Framework in Principle, Chicago: University of Chicago Press (1947): p. 170-171.

11. Ibid, p. 148.

> Because of his mental sloth he has fallen into a state of unthinking conformity . . .[12]

The way out of that mental sloth, Peterson suggests, is to put more faith in the press. Some began to question that role for the press in the 1970s. The news media's coverage of the Vietnam War and its connection with governmental sources prompted some to wonder whether the news media are capable of serving as the "custodian of morality."[13] It became clear that what the press meant by a right to know was taking the power to inform away from government and placing it in the hands of the press. The result, in the eyes of some critics, has been that the press is committing the same sins as the government -- withholding information and covering up mistakes.[14]

The right to know, however, is problematic not only because it fails to improve the flow of information, but because of its impact on the audience. Paul Lazarsfeld and Robert Merton, in what they termed the "narcotizing dysfunction" of the media as far back as 1948, note that the media have created a nation of people who collect great amounts of information but substitute that collection for action.[15] The right to know takes that development one

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12. Theodore Peterson, "The Social Responsibility Theory of the Press," in Four Theories of the Press, Chicago: University of Illinois Press, 1956: p. 100.

13. Bethell and Peters, p. 34.

14. Ibid, p. 34.

15. Paul F. Lazarsfeld and Robert K. Merton, "Mass Communication, Popular Taste, and Organized Social Action," in The Process and Effects of Mass Communication, Wilbur

step farther. Even if people do decide to collect information, which is rare, they will be seen as "spies" and troublemakers, not concerned citizens engaged in a discussion of public policy.

The Rights Revolution

The right to know is in many respects no different than other "rights" claims in the United States. Traditionally, the idea of rights has been used to secure protection in the legal and political culture for various groups. In recent years, civil rights have been used to secure protection for groups in society that traditionally enjoyed less power than the majority. David O'Brien calls the past 30 years a "rights revolution," with more and more members of the public claiming legal rights. During the past 20 years, that revolution has included a press claim for the right to know.[16]

However, rights have not always been used to protect the disenfranchised. In fact, until the late 1930s, rights were more commonly used to protect people who owned property.[17] Thus we find in the history of the United States that rights are used both to fight racism (civil

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Schramm and Donald F. Roberts, eds., Urbana: University of Illinois Press, 1971: p. 565.

16. David M. O'Brien, "Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication," Villanova Law Review, 26 (November 1980): p. 3.

17. Morton J. Horwitz, "Rights," Harvard Civil Rights-Civil Liberties Law Review, 23 (1988): p. 396.

rights) and defend racism (the property rights of people as recognized in the Supreme Court's Dred Scott[18] decision.) As Morton Horwitz notes:

> (I)t seems to be part of the indeterminate nature of rights discourse that it can be deployed with equal logic to protect the existing structure of privilege as well as challenge and delegitimate that structure.[19]

Not until the early 1900s did the Supreme Court shift its interest from protecting property rights to protecting the rights of minorities. Justice Stone's footnote in the 1938 Carolene Products case perhaps best articulates this new challenge to the Court:

> (P)rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[20]

Despite the Court's new-found concern for protecting the rights of the disenfranchised, the idea that rights are at their most fundamental level something to be "granted" or "loaned" to "the powerless by the powerful" never changed.[21] And if rights can be granted, they can certainly be taken away. The powerful expect groups to live up to the special status they have been awarded and to

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18. Dred Scott v. Sandford, 60 U.S. 393 (1857).

19. Horwitz, p. 399.

20. United States v. Carolene Products Co., 304 U.S. 144 (1938), p. 153, note 4.

21. Alan Freeman, "Racism, Rights and The Quest for Equality of Opportunity: A Critical Legal Essay," Harvard Civil Right-Civil Liberties Law Review, 23 (1988): p. 331.

behave in certain ways to justify their rights. What constitutes proper behavior often rests not with the performance of the group, but rather on individuals within the group.

For some, specifically some critical legal scholars, that is the problem with rights. By reducing rights to the individual level, society is denying that "the overall social distribution of wealth and power is unjust."[22] Power is located in the community, not the individual, in their view.

All these views underlie the right to know. Yet despite concerns of power and elitism, the right to know does have a positive, normative side, perhaps best illustrated by the role the concept could play in Habermas' theory of communicative action. Habermas views the world as essentially linguistically structured.[23] He puts forward, relative to his Frankfurt School roots, a more optimistic view of society -- a society composed of people capable of achieving, if not consensus, at the very least rational discourse about the issues that concern their lives.

Habermas attempts to link two parts of society: lifeworld and system. Roughly defined, the lifeworld is where communicative action takes place. It is in the lifeworld where tradition, culture, and language are

22. Horwitz, p. 400.

23. For a discussion of this point, see Thomas McCarthy, The Critical Theory of Jürgen Habermas, Cambridge: MIT Press (1988): p. 302.

"intersubjectively shared" and communicative action is made possible.[24] The public sphere, the "domain of our social life in which such a thing as public opinion can be formed," is located in the lifeworld.[25] It is in the public sphere where the possibility exists for citizens to engage in rational discourse under terms of the ideal speech situation.[26] Following George Herbert Mead, Habermas believes that people are formed as individuals through the socialization that takes place in the lifeworld.[27

While action is embedded in the lifeworld, it is functionally organized in the system. It is in the system, the area of strategic action controlled by the market and

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24. Habermas, The Theory of Communicative Action, Vol. 1, trans. by Thomas McCarthy, Boston: Beacon Press (1981): pp. 12-13.

25. Habermas, "The Public Sphere," in Seidelman, p. 231.

26. A summary of the ideal speech situation that has been adopted by Habermas is contained in Lawrence Byard Solum, "Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech," Northwestern University Law Review, 83 (Fall/Winter 1989): pp. 54-135. The elements of the ideal speech situation are:

1. Rule of Participation -- Anyone capable of engaging in conversation is allowed to participate.
2. Rule of Equality of Communicative Opportunity -- Each person can participate under the following:
   a. All proposals can be questioned.
   b. New proposals can be introduced.
   c. Attitudes, sincere beliefs, wishes and needs can be expressed.
3. Rules Against Compulsion -- Compulsion arising from either inside or outside the discourse is not allowed to prevent the rights guaranteed in No. 1 and 2 above.

See Solum, pp. 96-97.

27. Habermas, "Justice and Solidarity: On The Discussion Concerning 'Stage 6'," The Philosophical Forum, 21, 1-2 (Fall-Winter 1989-90): p: 46.

the bureaucratic state, that the material needs of the lifeworld are maintained.[28] Unlike some other theorists, Habermas sees a need to maintain a lifeworld-system link. In Habermas' view, the system originally grew out of the lifeworld. As the system increased in power and importance, it gradually "colonized" the lifeworld to the point that the lifeworld is no longer primary.[29] Because of this change, people in society feel alienated, powerless, and that their lives have little meaning.[30]

For Habermas, the lifeworld and system do not simply coexist, they are dependent on each other. In that regard, he recognizes the system for its unrealized potential. To reach that goal, the lifeworld must be decolonized and allowed to develop communicatively rationalized subsystems, limited by decisions reached through rational discourse.[31]

In many respects, law serves as a bridge between lifeworld and system. Law plays a role not only in the distribution of power and money in society, but presents a normative order to society.[32] In many ways, Habermas seeks to demystify law by opening the real base of its rationalization. To do so, Habermas argues that eternal

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28. Habermas, The Theory of Communicative Action, Vol. 2, trans. by Thomas McCarthy, Boston: Beacon Press (1987): pp. 153-155.

29. Habermas, Vol. 2, pp. 311-312.

30. Ibid, pp. 356-373.

31. Ibid, pp. 372-373.

32. Ibid, p. 365.

values are not needed, that instead society should adopt rational procedures for generating normative statements and legitimating values. As Habermas notes, once the validity of norms is questioned it is no longer sufficient to simply justify something solely on it legality.[33]

As law imposes itself on the lifeworld, it tends to limit the possibility of a properly functioning public sphere. Large corporations make compromises with the state, absent public discussion, and gain approval from the public "through the deployment of a staged form of publicity."[34] This information is often presented as being the product of rational public debate, when in reality it is an attempt to legitimate the product in an after-the-fact manner.

The right to know in a Habermasian world would open up the compromises and agreements that are behind such information for public discussion. It would allow citizens access to state information, but also access to the internal activities of private organizations as their activities relate to the state and other organizations. It is through this means that Habermas hopes citizens will be able to determine whether a consensus was achieved not through state or corporate coercion, but solely through the force of the better argument. The press, the "public sphere's preeminent

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33. Ibid.

34. Habermas, in Seidelman, p. 236.

institution,"[35] would not be immune from this inquiry. He envisions a press that does not present information as an already-achieved rational consensus, but rather information condensed so that people can use it to achieve consensus through rational discourse.[36] In short, the Habermasian press does not replace the knowing, inquisitive citizen, but rather encourages that citizen to inquire and obtain knowledge.

The Prison Access Cases

Habermas' theory provides a starting point for an evaluation of the role the right to know plays in today's society. This section of the paper will begin that evaluation by reformulating Ronald Dworkin's distinction between the First Amendment as principle and policy [37] into a Habermasian framework.[38] The distinction will be

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35. Habermas, The Structural Transformation of the Public Sphere, trans. by Thomas Burger, Cambridge: MIT Press (1989): p. 181.

36. Habermas, Vol. 2, p. 390.

37. See Ronald Dworkin, "Is the Press Losing the First Amendment?," in A Matter of Principle, Cambridge: Harvard University Press (1985).

38. The use of Dworkin's distinction between policy and principle is by no means intended to collapse the theoretical perspectives of Dworkin, a liberal theorist, and Habermas, traditionally thought to have communitarian ties. For example, while Dworkin and Habermas might favor a principle interpretation of the First Amendment, it would be for different reasons: Dworkin for the power it gives to individuals, Habermas for the role it can play in generating a rational consensus. It is interesting to note, however, that even Habermas has begun to recognize that his theory has some links with liberalism. In 1985, Habermas said: "(A)fter all, my Marxist friends are not entirely unjustified in accusing me of being a radical liberal." See

used to analyze the U.S. Supreme Court's decisions in three prison access cases.

A policy interpretation of the First Amendment is grounded in the protection of the audience. The press is granted certain powers, not necessarily because it is entitled to them, but rather because it is the best way to secure some general good for society. Under the First Amendment as principle, primacy is given to the individual's need to express his or her views or to collect information.

Underlying the policy-principle dichotomy is the right to know. The First Amendment as policy recognizes some form of the current articulation of the right to know. It places in the news media's hands powers and rights that are special to them to use to protect and inform society. A policy interpretation of the First Amendment forces courts to balance special privileges for the press against the need to protect and inform the audience. Society is not considered to be part of the equation.

Underlying a principle interpretation is a different idea of the right to know. People's rights of expression, within boundaries, are paramount. In a Habermasian framework, the goal is a citizen's ability to enter into the public discourse and to obtain information to continue that discourse. Following that reasoning, special privileges would not be created, at least not by the state, for special

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the interview with Habermas, New Left Review, "A Philosophico -- Political Profile," 5 (May/June, 1985): p. 94.

groups of people, such as journalists. If special privileges are to be granted, it can be only as a result of rational discourse within the public sphere.

Three cases in the 1970s helped set the limits of how much access the press could have to not only federal prisons, but state prisons and county jails as well. The decisions of the Court and the opinions of the individual justices helped define the boundaries for what is today's right to know. For that reason, the prison access cases are important far beyond their immediate impact. In the three cases, Pell v. Procunier [39], Saxbe v. Washington Post [40], and Houchins v. KQED [41], the majority of the Court found that the news media do not generally enjoy privileges that exceed those of the general public. Taken at face value, the rulings seem to indicate that the majority of the Court favors a principle interpretation of the First Amendment. However, it will be shown in the following review of each case that the justices, no matter what side of the decision they were on, tend to ground their decisions in a policy interpretation of the First Amendment.

Pell v. Procunier

Prison inmates and members of the news media sought to improve access to the California prison system when they

39. 417 U.S. 817 (1974).

40. 417 U.S. 843 (1974).

41. 438 U.S. 1 (1978).

jointly filed suit against the system's director. The case, decided the same day as Saxbe, sought to determine whether a system-wide rule that prohibited press interviews with specific individual inmates violated the inmates' right to speak as well as the reporters' right to gather information. This review will center on the journalists' claim to the right to gather information; the Court's debate around the issue of the rights of inmates is interesting, but beyond the scope of this paper.

The Court, in a 5-4 vote, found that the press does not enjoy any special access privilege to the California prison system.[42] Justice Stewart, who authored the decision for the Court, seems to make the point clear: "(N)ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[43] Taken by itself, Justice Stewart's comment seems to be following a principle interpretation of the First Amendment. However, a more detailed reading of his decision leaves a different impression.

Part of the clue to Stewart's real interpretation of the First Amendment can be found in his reliance on Branzburg v. Hayes.[44] While the Court in Branzburg

42. Justice Powell agreed with the minority on the press question; he voted with the majority on whether the rules violated the inmates' rights, making the decision 6-3 in that portion of the case.

43. Pell v. Procunier, p. 834.

44. 408 U.S. 665 (1972). The Court found that journalists were not automatically exempt from appearing before grand juries.

stopped short of giving the press special privileges when facing a grand jury subpoena, it also found that "news gathering is not without its First Amendment protections."[45] In addition, Stewart notes that while the press does not deserve special access rights to prisoners, he sees nothing wrong with the department continuing to grant reporters special privileges in other areas. Stewart notes that reporters are allowed to visit maximum security and minimum security areas and to stop and speak to inmates they encounter. Reporters are allowed to observe group sessions and interview randomly selected inmates for interviews. As Stewart writes, "In short, members of the press enjoy access to California prisons that is not available to other members of the public."[46]

Stewart attempts to turn the press' argument around. Rather than directly grant the press special access, Stewart argues that a minimum standard of equal access is the goal. And since the California rules allow the press access to information available to the general public, the rules meet the Court's minimum standard. Stewart writes:

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, ... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.[47]

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45. Ibid, p. 707.

46. Pell v. Procunier, pp. 830-831.

47. Ibid, p. 834.

Justices Powell and Douglas adopt a more straightforward policy argument in their dissenting opinions. Powell believes the interview ban restrains the press from conducting its constitutional function "of informing the people on the conduct of their government."[48]

Justice Douglas follows much that same vein, arguing that the press' rights are in the end the people's rights. He calls the ban an unconstitutional infringement on the "public's right to know protected by the free press guarantee of the First Amendment."[49] For Justice Douglas, it is only realistic to give the press this special power.

> The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.[50]

Saxbe v. Washington Post

In 1972, the Washington Post requested permission to interview specific inmates at two federal prisons. The Federal Bureau of Prisons, citing existing regulations, denied the newspaper permission. Existing rules allowed reporters to interview inmates in minimum security prisons, but reporters were denied access to medium- and maximum-

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48. Justice Powell's dissent, p. 835.

49. Justice Douglas' dissent, p. 841.

50. Ibid, p. 841.

security institutions, which at the time amounted to about three-quarters of all federal prisons in the United States.

Justice Stewart, who authored the decision in the 5-4 decision, relies on much the same reasoning as Pell. He notes the press is entitled to numerous privileges the public does not enjoy, such as prison tours, random interviews, and uncensored correspondence through the mail.[51] Stewart concludes that the bureau's regulations are not an attempt to hide conditions in the prison, but rather to maintain order. And since the press is not placed in a less advantageous position than the public, he sees no problem with the rules.[52]

The majority's opinion in Saxbe prompts Justice Powell to write a lengthy dissent. Powell is careful to point out that reporters do not have constitutional rights superior to those of the public.[53] However, he notes that the right to publish must be extended to some degree to make that right "meaningful."[54] Powell goes on to give a very clear policy interpretation of the First Amendment:

> An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news

51. Saxbe v. Washington Post, p. 847.

52. Ibid, p. 849.

53. Ibid, p. 857.

54. Ibid, p. 859.

> the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.[55]

Houchins v. KQED

It took four years before another prison access case reached the Supreme Court. But in 1978, the Supreme Court in a 4-3 decision[56] ruled that a television station did not have a special right of access to a county jail in California. The station had sought permission to film and interview inmates in the jail following the suicide of an inmate. It had been reported that the conditions inside the jail were the cause of the suicide.[57] A lower court issued a preliminary injunction allowing the station to film inside the jail, noting that the jail had instituted jail tours open to the press only after the complaint was filed. The case was appealed to the Supreme Court.

Chief Justice Burger, in his decision for the Court, notes that never has the Court intimated that the press had a right of access to all information held by the government. However, Burger goes one step beyond Stewart's earlier decisions. He notes that inherent in the media's request is

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55. Ibid, p. 863.

56. Justices Blackmun and Marshall did not take part in the decision.

57. Houchins v. KQED, p. 1.

the belief that the press is best qualified to discover wrongdoing in government. That assumption, he writes, "finds no support in the decisions of this Court of the First Amendment."[58] Burger does keep the door open, writing that should state legislatures or Congress choose to give the media some form of access, the Court would have no problem with it.[59]

Burger never brings himself to advocate a straight policy interpretation. He notes that the news media are the "eyes and ears of the public," and while they are not a substitute for government or the courts, they do serve a function in society. And he notes that "like all other components of our society media representatives are subject to limits."[60] He goes on to note that in many instances, those limits are wider than those enjoyed by the public. The media, for instance, cannot be forced to publish something against their wishes.[61]

Justice Stewart, in a concurring opinion, modifies his earlier claim that the press and the public were one and the same. He attempts to fashion a flexible definition for the term "equal access" in order to "accommodate the practical distinctions between the press and the general public."[62]

58. Ibid, p. 14.

59. Ibid, p. 16.

60. Ibid, p. 8.

61. Ibid, p. 14.

62. Ibid, p. 16.

A reporter does not tour jails "for his own edification," Stewart notes, but rather to enlighten society.[63] Thus, Stewart concludes:

> (T)erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.[64]

Stewart finds that the lower court's injunction giving reporters access to the jail was adequate and votes with the majority.

Justice Stevens dissents, arguing that the First Amendment should protect more than the mere dissemination of information. It should also protect the "receipt of information and ideas."[65] Much like Stewart, he notes that the public and the press have an "equal right to receive information and ideas," but special methods may be needed to meet the "special concerns of the one or the other."[66] In this case, an injunction giving the press access to the jail is not "invalid simply because it awards special relief to a successful litigant which is a representative of the press."[67]

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63. Ibid, p. 17.

64. Ibid, p. 17.

65. Ibid, p. 30.

66. Ibid, p. 39.

67. Ibid, p. 39.

Reawakening the Public Sphere

The news media's reaction to the Supreme Court's rulings in the three cases could have been anticipated. A New York Times editorial said the cases will "unquestionably impede efforts at prison reform."[68] The Washington Post, a plaintiff in one of the cases, issued a more harsh review.

> The public cannot regularly tour the prisons and interview inmates any more than the public could be expected to learn all it needs to now about Congress by attending all its hearings. It could not master the issues of the city council by going to all its deliberations. That is the role of the press -- to obtain and convey that vital information required by a self-governing people if they are to make wise decisions.[69]

Still, the press' disappointment in the Court's rulings seems shortsighted. The press asked the Court to adopt a policy interpretation of the First Amendment and in turn grant it special privileges and immunities. The justices, to varying degrees, went along with that request. It is true that the Court stopped short of recognizing an unqualified right to know for the press, but all of the justices agreed that the press does in some instances enjoy rights that are greater than those enjoyed by the public. Even Chief Justice Burger, the justice who comes closest to adopting a principle interpretation of the First Amendment, stops short of adopting that stance in the end.

In effect, the Court presents different gradations of the policy interpretation. The Court refuses to grant the

68. The New York Times, June 27, 1974, p. 44.

69. The Washington Post, June 27, 1974, p. 18A.

press unlimited access to prison and jails, masking that decision in the claim that the press' rights are no greater than the public's. Lost in the decisions are the fact that the Court remains silent about special privileges already enjoyed by the press -- privileges that put the press above the public. While the justices seemingly affirm the idea that the press and the public are equal, they ignore the fact that the press enters the discussion from a preferred position over the public. The Court reformulates the argument to make sure the press has equal access to public information. It seems to ignore the more fundamental issue of whether the public should have access to information produced by and about government. Neither the press nor the Court questioned the primary assumption of the prison access cases: A public interested and concerned enough to inquire about conditions inside the prisons was not a goal for which to strive. As Justice Stewart so succinctly points out, citizens touring a jail or prison for their own edification is not something of value for society.

O'Brien claims that the idea of the right to know that is prevalent in today's society is not something created by the courts, but rather by the public and especially by the media.[70] While O'Brien's thesis might be correct about the genesis of the idea, a reading of the prison access cases indicates that the right to know has little connection with the public today. Decisions about the contours of the

70. O'Brien, p. 9.

right to know, and in turn what information the public will have a chance to receive, are made between the press and the judicial system. No longer is the primary question whether the citizen has the right to obtain information. Rather, the question is whether an institution has a special privilege not enjoyed by the rest of society. And beyond that, whether that institution is the proper one to invest with the privilege to improve society.

That line of reasoning can be seen in Chief Justice Burger's decision in Houchins. The question for him is not whether the press has a right to the information so much as whether the press is the right body or organization in which to place society's trust to improve the prison system. If not, there is no reason to grant the press special status. The answer for Burger is a resounding no.

In the end, the right to know, which started as a way to improve society, became the pawn in a press-government battle -- a battle that remains out of the lifeworld. Unfortunately, the damage extends beyond the legal arena. A policy interpretation hinders Habermas' project of creating a properly functioning public sphere. Under a policy interpretation, power remains locked in the corporate-state world, not in the public sphere. The press and the state are allowed the privilege of defining the right to know under a policy interpretation.

In many ways, a policy interpretation of the First Amendment furthers what Carey calls a scientific definition

of journalism: "it assumes an audience to be informed, educated by the journalist and the expert."[71] Not only does the press believe the public has no desire to seek information, justices on the country's highest court share that opinion. By separating themselves from the public, by putting themselves above society, journalists are guaranteeing the type of audience they claim to be trying to prevent. Members of society are not encouraged to think for themselves, to seek answers to problems, and engage in public discourse. Instead, journalists fill that role for them. In the end, people feel powerless and ultimately lose interest in political life. There is no doubt the audience shares some responsibility for this problem. But the question remains: How much of this situation has the press created?

71. Carey, p. 17.

Legal Issues in Electronic Alteration of News Photography

by

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A paper presented at the annual AEJMC Convention, Minneapolis, Minnesota, August 10, 1990.

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It was such a simple problem; an unwanted Diet Coke can appearing in the lower left corner of a photograph of the latest Pulitzer Prize winning photojournalist. All one had to do was crop the item out of the image before it was published in the St. Louis *Post-Dispatch*. Unfortunately, the can was "scitexed;" i.e. electronically removed via a machine whose brand name has become synonymous with electronic alteration of photographs.[1]

The removal of the Coke can raised an issue that is a hot topic among the nation's news photographers. Wherever one turns, conversations and commentaries on the practical as well as ethical issues of electronic manipulation of news photographs abounds.[2]

Journalists from around the country have expressed their concerns about potential abuses of this new technology. Edward Klein, editor of New York Times Magazine, said that "the new technology has the potential of undermining our faith in photography as a reflection of reality." Tom Hardin, photo editor Louisville Courier-Journal said that electronic alteration of photographs "is tantamount to changing quotes. We're not in the quote-changing business, I hope." Robert Gilka, former director of National Geographic magazine said that electronic alteration of photographs is "like limited nuclear warfare. There ain't none."[3]

Although many have discussed the ethical issues surrounding electronic alteration of news photography, a discussion of the legal

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Notes

[1]Staci Kramer, "The case of the Missing Coke Can," *Editor and Publisher*, April 29, 1989, pp. 18-19.

[2]For a sample of the discussion accompanying the ability to electronically alter news photographs, *see*, Michael Evans, "An Open Question: Emphatically Accurate Photos," *News Photographer*, November 1989, pp. 26-28; Tom Hubbard, "AP Photo Chief, AEJMC Professors Discuss Ethics, Electronic Pictures at Convention," *News Photographer*, January 1987, pp. 33-34; Greg Peters, "Mesmerized by the New Technology," *News Photographer*, March 1990, pp. 44, 52-53; Shiela Reaves, "Digital Retouching," *News Photographer*, January 1987, pp. 23-33.

[3]Reaves, pp. 27-29. Included in this discussion is an ironic note in the policy statement governing the use of electronic alteration of images in the St. Louis *Post-Dispatch*. "One of the functions of the Scitex system," the policy statement read in part, "is to enhance the technical quality of photographs to be published in the Post-Dispatch. To assure the integrity of our visual reportage, the system may not be used to distort or change the image in a way that misleads the reader, be it for news or feature display." Kramer, p. 19.

issues raised by electronic alteration of news images has yet to surface to the same degree. This paper is an opening offer for those who are interested in legal issues that may accompany electronic alteration of news photography.

What follows is this author's views on legal issues that may be raised when a journalist decides to electronically alter a news photograph. These observations are based upon the author's previous research in legal issues in photojournalism* and should be read with the understanding that what is presented below is one person's view of how legal issues *may* be raised in this area. This paper, in other words, is written more in the realm of "informed" speculation as opposed to the more traditional detailed analysis of well established bodies of court decisions, statutes and administrative regulations.

Invasion of Privacy Via Electronic Alteration of Images

One of the most obvious areas of law that may become involved in electronic alteration of news photography is invasion of privacy. On a daily basis, photojournalists are confronted with moments that easily raise privacy concerns.

On the positive side, being able to electronically alter individual's images so that they are unrecognizable is currently proving its worth. One need only to watch televised reports of police raids into suspected crime scenes to see how well electronic alteration can help bring valuable images to the general public.

By electronically altering individual's faces so that they are unrecognizable, news media organizations may defuse two different invasion of privacy actions. In a situation where a person was actually involved in an illegal activity, the concealing of that individual's identity would make it difficult for that person to argue that he/she had been caught up in an embarrassing private facts situation.

Instead of having to fall back to the more traditional defense of newsworthiness in countering an embarrassing private facts suit, a news organization could take the position that the individual's

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*For those who are interested in specific cases and/or the general concepts that provide the basis for the observations made in this paper, *see*, Michael D. Sherer, "Freelance Photojournalists and the Law", *Communications and the Law*, 5:39-48 (October 1988); Michael D. Sherer, "A Survey of Photojournalists and Their Encounters with the Law," *Journalism Quarterly*, 64:499-502, 575 (Summer 1987); Michael D. Sherer, *A National Report: No Pictures Please It's The Law* (Durham, N.C.: National Press Photographers Association [1987]); Michael D. Sherer, "Copyright and Photography: The Question of Protection," *Communications and the Law*, 8:31-38 (December 1986); Michael D. Sherer, "The Problem of Libel for Photojournalists," *Journalism Quarterly*, 63:618-623 (Autumn 1986); Michael D. Sherer, "Photojournalism and the Infliction of Emotional Distress," *Communications and the Law*, 8:27-37 (April 1986); Michael D. Sherer, "The Problem of Trespass for Photojournalists," *Journalism Quarterly*, 62:154-156, 222 (Spring 1985); Michael D. Sherer, "Obtaining the Photojournalist's Work Product Via Warranted Searches and Subpoenas," *Communications and the Law*, 6:3-14 (August 1984).

identity had been concealed from the general public by the electronic alteration of the image in question. Without identification (assuming of course that the accompanying news report did not provide such explicit details that others would be able to learn the person's identity), establishing a case for embarrassing private facts invasion of privacy would more difficult.

The electronic alteration of portions of an image may also help defuse invasion of privacy actions. Take, for example, the thought that if one could have electronically altered in just a slight fashion the image of a woman clutching only a small towel to her nude body as she was being rescued from a hostage situation, she may have had less objection to the depiction of her in a newsworthy, although to her, terribly embarrassing private facts situation.[5] One could also assume that a photograph of a man cavorting in front of thousands of football fans with his "fly" open would also be less inclined to argue that he was captured in an embarrassing private facts situation if his pants had been electronically zipped before the image was published in a national sports magazine.[6]

Innocent persons caught up police raids would also be hard pressed to argue any form of false light invasion of privacy if their faces were electronically altered/eliminated before the material was communicated to the general public. Here too, the elimination of an individual's identification via electronic alteration of the person's face could help defuse the argument that the person was falsely portrayed in a news report.

For the public, electronic alteration of images of police raids means very little is lost. Although individual identities are protected, the public still has the unique opportunity to witness newsworthy events as they unfold before the camera. Clearly, electronic alteration of individual identities to avoid embarrassing private facts and false light invasion of privacy issues has benefits for both journalists and the general public.

There are situations, however, where electronic alteration of photographs provides neither the general public nor the news media with any real benefits. Take, for example, the electronic alteration of photographs on the covers of several "Day in the Life of ..." books. Rick Smolan, creator of the series, has argued that electronic alteration of the photographs on the book covers helps the covers advertise the books.[7]

This line of reasoning, the use of cover photographs as advertising tools, could cause problems. In the past, news organizations have been able to effectively argue that photographs used on magazine covers are part of the editorial content of the publications, and thus do not constitute an appropriation of a person's likeness for commercial gain. However, if cover photographs are seen more in a commercial role, as opposed to a news editorial role, the use of an individual's photograph for commercial gain (i.e. on the cover of a magazine or book) may find support in the courts.

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[5]Cape Publications v. Bridges, 8 Media L. Rep. 2535 (Fla. Dist. Ct. App. 1982).

[6]Neff v. Time, 406 F.Supp. 858 (D. Pa. 1976).

[7]"Cover Story," *News Photographer*, January 1987, pp. 25-26.

Another cover related issue is the infrequent practice of electronically bringing together elements and/or individuals from separate images into one final cover photograph. Take for example a cover photograph of Nancy Reagan and Raisa Gorbachev. Although it appeared the two women were seated together, the cover was electronically "spliced" from two separate photographs.[8]

The publication of composite photographs clearly raises questions of false light invasion of privacy. Although one journalist said, "I have strong objections to news photos (being electronically altered) but no problem if you're taking file photos and making a collage to illustrate a story,"[9] the very act of making a collage from file photographs can raise serious questions of falsely portraying persons in situations that have little or no connection with the stories that accompany the photographs. Without a direct relationship between the photograph and accompanying story, as well as an accurate and truthful presentation of a person in the image, false light invasion of privacy claims may find favor in the courts.[10]

Electronic storage of images may also raise false light invasion of privacy problems. The ability to almost instantly access vast data banks of file photographs could result in the inadvertent use a photograph that has little connection with an accompanying story.

A Question of Libel

The use of file photographs can also raise concerns in the area of libel. In this area, the courts have said that any question of photographic libel must be judged in the context of the accompanying story. If it can be established that a person would connect those in a photograph with potentially defamatory accounts contained in accompanying news story, then the case may go before a jury for a final determination. Once again, the ability to electronically retrieve unrelated images and drop them into news accounts that may contain defamatory content raises the possibility that this new technology can lead to increased libel litigation.

Electronic alteration may also be used to eliminate the key problem of identification that is raised in photographic libel cases. With the ability to electronically alter/hide a person's identity (as one often sees in televised news reports of suspected criminal activity), it is less likely that the individuals photographed will be able to establish the fact that they were identified by the images. Without clear identification, libel litigation will fail because the persons in the images will not be able to prove that the defamatory statements were "of and about" them.

Electronic alteration of elements other than a person's identity may, however, lead to successful libel suits. Imagine how easy it would be to establish malice on the part of a news organization if it could be shown that an image had been electronically altered prior to publication. The fact that an image was altered could certainly

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[8]Reaves, p. 26.

[9]*Id.* p. 30.

[10]Gill v. Curtis Publishing Co., 239 P.2d 630 (Cal. 1952); Metzger v. Dell Publishing Co., 136 N.Y.2d 888 (N.Y. Sup. Ct. 1955).

constitute reckless disregard for the truth contained in the image, and thus would be an act of malice on the part of the news media.

The distortion of truth in news photography lies at the heart of electronic alteration of images. When the truth in an image is distorted through electronic alteration, one of the fundamental defenses in libel litigation is virtually thrown out the window.

The Electronic Infliction of Emotional Distress

The distortion of photographic truth though electronic alteration of news images may also create problems another area of the law; the infliction of emotional distress. On several occasions, individuals have argued that the publication of news photography has caused emotional harm to those captured in the images.

In an intentional infliction of emotional distress suit, a key element that has to be established is that the offending party acted with extremely outrageous conduct that was either intentional or reckless. The courts have paid particular attention to the conduct of those who gathered and published the offending information, looking for conduct that would constitute an extreme departure from ordinary reporting standards. Undoubtedly one could make an effective argument that electronic alteration news photographs constitutes an extreme departure from ordinary reporting techniques.

While this is only one element in an emotional distress suit, surrendering on this point by engaging in a practice that is ethically shunned by many leading journalists could easily give a court reason to seriously consider a claim that a news photograph caused emotional distress to those captured in the image.

For those who may not consider electronic alteration of news photography as extremely outrageous conduct, there is always the problem of negligent infliction of emotional distress. Under this concept, an individual does not have to establish extremely outrageous conduct on the part of the news media provided that he/she can prove that the publication of the offending image resulted in illness or other bodily harm.

What is troublesome for all journalists faced with a negligent infliction of emotional distress action is that the conduct complained of need only be negligent, a standard much lower than extremely outrageous conduct and thus easier to prove in court.

Subpoenas for Electronically Altered Images

Although electronic alteration of news photographs may be considered to be an unacceptable reporting technique, there are times when this ability can be useful. This is especially true when statements are used from individuals who have knowledge of illegal activities but do not wish their identities to be revealed.

Once again, one has only to recall recent television news accounts concerning such issues as drugs, murder and prostitution. On more than one occasion, news organizations have gotten confirmation on stories of criminal activity through the use of sources who are

willing to give statements on camera provided that their identities are concealed.

With this new technology, masking a source's identity is relatively simple and no doubt tempting to those news organizations who wish to report on matters of public interest. The catch-22 element of this technique, however, is that the use of these unidentified, electronically masked sources invites subpoenas from governmental agencies who want to know all that a news organization knows. Subpoenas, the number one legal problem faced by most news photographers, may be even more troublesome for those organizations who make active use of on camera electronically altered "unidentified" sources.

Copyright and the Issue of Electronic Alteration of Images

One final legal action that may be contemplated when images are electronically altered lies in the area of copyright. Questions of who owns the images and who can control their use when electronic alteration enters the scene are just now being raised.

One contract photographer for a national magazine expressed his concern that the increasing use of electronic technology in photography means that "there are no technological fences; you can't put a lock on the photographs."[11] Simply stated, there is no way one can control the use of images that have been digitized and have been placed into computer data bases and other electronic services.

This lack of control over one's images is especially troublesome for freelance photojournalists. Imagine loosing all practical control over the one product that freelance news photographers have to make an income; their photographs. Without the ability to receive payment for subsequent use of their photographs, all photographers who work on a contract basis stand to loose a key portion of their income.

Complicating matters even further is the concept of fair use. As the law now stands, a person may make use of a portion of a copyrighted image provided that the use does not impact the potential market or value for the copyrighted work. This means that a person could electronically extract only a portion of a copyrighted photograph, use that portion of the image in another manner, and yet not violate the copyright on the original image.

The ability to convert a photograph into an electronic state, and then reuse that image either in whole or part in a manner that is virtually undetectable from the original image poses a serious threat to all those who make a living through the sale of photographs.

Final Thoughts

In looking over some of the legal issues that may be raised news photographs are electronically altered, it is obvious that this new technology represents a truly double edged sword. On one side, electronic alteration may provide a means of protecting the news

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[11]"High-tech and Copyright: Mixing Like Oil and Water," *Photo District News*, May 1990, p. 18.

media from damages sought in some legal suits. On the other side, the fact that electronic alteration of a photograph changes the "truth" contained in the image may do more harm to the value of the photograph than would ever be gained via alteration.

Clearly there are no simple answers. Just as this ability to electronically alter news photographs is in its infancy, so too are the legal issues that may be raised when this occurs.

What has been presented in the preceding paper is one person's observations of what might be raised when a question of law is applied to an electronically altered image. Whether or not any of these issues may actually find their way into the courts remains for others to determine.

As for this author, the best thought that can be applied to the entire issue of electronic alteration of news photographs was offered by Ron Mann, former photo editor of the Orange County *Register*. He said, "Don't manipulate the photo, manipulate your brain."[12]

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[12]Reaves, p. 29.

Recognizing the Economic Functions of the Television Censors

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Abstract

This paper traces the historical development of the functions of American television networks' standards and practices departments and details recent controversies over network programming. Due to changes in ownership, management expectations, and the regulatory environment, the censors have lost much of their power since the late 1980s. The paper concludes by presenting a case for a program management perspective whereby the networks could use "rebuilt" standards and practices departments to fulfill a three-part function: (1) to sense changes in the public mood, (2) to influence public policy, and (3) to stabilize relationships with their audience and advertisers.

Recognizing the Economic Functions of the Television Censors

I.

The year was 1968. The program was "Laugh In." George Schlatter, the producer, wanted to use the line "Look that up in your Funk & Wagnalls." The Department of Standards and Practices at NBC objected on the grounds that the phonetics of the phrase came close to profanity. After a great deal of haggling, the censors gave in with one condition. The ampersand would have to be pronounced distinctly as "and" and not as "'n'" (Brown, 1971).

In 1977, when ABC announced it would include the program "Soap," a parody of soap operas, on its fall schedule, the network received 32,000 protest letters. Many of those letters were the result of the efforts of Donald Wildmon, a minister from Mississippi, who had not seen the program (Gitlin, 1985).

In 1989, NBC's "Saturday Night Live" repeatedly used the word "penis" in a comedy skit. Two sponsors responded to viewer complaints by withdrawing their commercials from the program (Freeman, 1989). On Fox, the program "Married . . . With Children" became the target of a pressure campaign organized by a Michigan woman (Lasswell 1989).

These incidents all have a common focus: in each case the television network executives made a conscious decision as to whether programming should become the source of potential economic pressure from advertisers. The changing nature of

network television has put controversial programming on the air, and some viewers have responded with alarm. What forces are at work within the network structure that would make possible these changes in broadcast standards? Or, are these changes in programming a reflection of changes in societal standards and expectations? The 1950's program, "I Love Lucy" never mentioned Lucille Ball's rather obvious pregnancy, while common fare for television shows of the late 1980's includes discussion of all forms of sexual practices. This paper will address these issues with the goal of delineating a future role for self-regulation of network television program content. I will begin by presenting an overview of the history and traditional purpose of the networks' standards and practices departments, followed by a discussion of economic pressures facing the networks. Finally, I will discuss the functions of developing a program management perspective for the television networks as they attempt to respond to viewer complaints that concern program content.

II.

The standards and practices departments at the three networks traditionally have had total authority over everything the network sends to its affiliates, the sole exception being news programming (Davis, 1987). Programs and commercials alike are subject to review. While the standards and practices departments avoid public disclosure of their differences with producers (Turow, 1984), the word of the censors is final

(Eastman, Head and Klein, 1985).

Given the role in the 1920s of protecting the network-owned station licenses from government regulatory action, the network censors (then known as the departments of continuity acceptance) had little power as long as broadcasting consisted of single-sponsor radio programs. Sponsors were responsible for the content of their programs, while the network censors were relegated to checking commercials for "taste" and veracity (Davis, 1987). But there was a "striking discontinuity" between the structure of the early radio networks and the television networks of the 1950s (Boddy, 1987). Spot advertising was on the rise, while single-sponsor programs were falling from favor. The National Association of Broadcasters developed its Television Code in 1952, in part to forestall government regulation (Davis, 1987). The quiz show scandals of the late 1950's signalled the final declension of the sponsors' and their advertising agencies' power to rule over the content of network television programming.

Much of the credit for increasing the networks' control over their programming goes to NBC's Pat Weaver, the developer of programs such as "The Today Show" and "The Tonight Show." With a background in advertising, Weaver saw television as a mechanism capable of increasing Americans' economic consumption (Boddy, 1987). One way to do that was to sell television receivers. And since NBC was owned by RCA, which held most of the patents on television components, Weaver's arguments in the corporate boardroom found a sympathetic hearing (Galanoy, 1972). Weaver's plan was to increase network control over scheduling and content,

thus giving NBC the ability to compete with CBS and its well established stars. He would become competitive by developing network-owned programs and offering spot advertising time to the sponsors. While the advertising agencies were initially opposed to the changed structure, by 1954 CBS was also offering spot advertising time. The benefit for sponsors was in their ability to use the new medium at a cost far below what would have been required under the old single-sponsor program structure. These new sponsors, "less interested in corporate image advertising than in direct product pitches for small-ticket, largely undifferentiated goods, became and remain the major underwriters of network television" (Boddy, 1987, p. 357).

The success of Weaver's "magazine plan" of selling time, combined with a new activist posture by the Federal Communications Commission, meant that the network censors assumed an even larger role in the 1960s (Davis, 1987). This larger role, which lasted for almost three decades, was based upon a rather narrow foundation. The focus of concern dealt primarily with three types of problematic content: sex and violence in fictional programming, and claims made in advertisements. This expanded mission would continue until the late 1980s when corporate restructuring would bring about new operating parameters for the standards and practices departments.

While the original mission of the continuity acceptance departments was protection of network-owned station licenses, which changed into an encompassing responsibility for both

advertising and program content, the evolution of the censors included the development of an important liaison role with the various publics with which the network had dealings. Though the importance of the censors was found in their work with program suppliers and advertisers, they also became a contact point for the network and affiliates, viewers, and legislators (Davis, 1987). The standards and practices departments knew that a major responsibility (in addition to protecting the networks' owned-and-operated station licenses) was to keep the affiliates satisfied. Failure to do so would result in the loss of a geographic piece of the network which, in turn, would mean that less money could be charged for each commercial. To carry out this mission of satisfying the affiliates, the standards and practices departments carefully monitor the feedback from viewers (Brown, 1971). NBC has gone so far as to make network representatives available to meet regularly with interest and ethnic groups (Davis, 1987). The argument could be made that the operation of the standards and practices departments fulfill a public relations function that may, at the same time, both overshadow and include the stated mission of protecting viewers from offensive program content.

The distinction between performing public relations and censoring program content is not minor. The former assumes a broader scope, including all the publics with which the network must deal, while the latter specifically concerns only the impact of the program on the viewer. The former assumes an economic justification, while the latter, at least partially, assumes a

sociological justification. It must also be noted that while the end result of both processes is a similar form of self-imposed creative censorship within the organization, an economically-justified censorship will produce programming designed to maintain consumption of goods by viewers, while a sociologically-justified censorship will produce programming designed to maximize the beneficial impact on society. In other words, a system based on economic justification will risk offending viewers only when the possible economic benefits appear to outweigh the possible economic costs. The system based on sociological justification will risk offending viewers only when the possible benefits to society appear to outweigh the possible costs to society.

To even the most casual observer, it must be clear that American network television programming operates on a basis of economic justification. The result is that very little programming that could offend is aired by the networks. When they do attempt to program a series or movie that may involve controversial elements (or even non-controversial elements that might interfere with the viewer's pre-conceived ideas), the censors routinely "sanitize" the content. When the idea for "American Dream" was proposed in 1980, the producers saw the program as one suburban family's attempt to "homestead" within a tough, urban neighborhood. Directors attempting to film the program had to contend with ABC network representatives who objected to trash cans in alleys, graffiti on walls, and high school gymnasiums that were too "brown." Though the program was

filmed on location in Chicago, the network wanted to remove those elements that suggested a less-than-joyful setting. A son's affair with a much-older prostitute was changed to an ambiguous liaison with a 24-year-old waitress (Gitlin, 1985). "American Dream" lasted only half a season before being cancelled by ABC.

III.

The idea that a network's economic interests are threatened by an offended audience is not without merit. An audience that is offended to the point of action is feared by the station manager who makes the decision to affiliate with a particular network or to carry a particular program. The loss of a station, even for a single program, directly impacts the income of the network. Self-regulation, then, began as an attempt to forestall government regulation of content (Liebert and Sprafkin, 1988). On three separate occasions in the 1970s, the networks had to defend themselves against efforts to curb television violence. In each instance the networks relied upon a "First Amendment defense," claiming that government regulation of content would violate their constitutional guarantee to freedom of speech and of the press (Reel, 1979).

In 1970, the Federal Communications Commission enacted the Prime Time Access Rule, which returned one-half hour of what had been network programming to the control of the local stations. It was the hope of the FCC that the ruling would encourage the local stations to serve their local community and family needs

with public service programming and to develop new program formats. In turn, these new forms of programming would displace some of the violent content that was drawing attention from interest groups (Liebert and Sprafkin, 1988). The result, however, was an increase in inexpensive game shows and re-runs of old situation comedies. The FCC, under chairman Richard Wiley, recognized the failure of the PTAR to accomplish its mission and in 1974, after several meetings with the three network presidents, announced that the evening hours from 7:00 to 9:00 would be kept free from themes that would be objectionable to children. In 1975, this informal agreement, "Family Viewing Time," was included in the National Association of Broadcasters' code. One CBS executive told a group of writers that the goal was to "not offend the most uptight parent that we can imagine watching with his children" (Davis, 1987, p. 35). Unfortunately, the agreement failed to define what was specifically prohibited. A growing sexual permissiveness in society seemed to suggest that sexual topics would be allowed, while violence would be regulated, though to what degree was unknown (Reel, 1979). Though opinion polls showed strong public support for the measure, a court challenge in 1976 found the agreement was unlawful for three reasons: the FCC's involvement violated the First Amendment, the FCC had proceeded in an unofficial manner, and the networks had restricted the First Amendment rights of the individual television stations (Liebert and Sprafkin, 1988). The court ruled that the individual stations could choose to voluntarily continue the Family Hour on an individual basis, but they chose to abandon it.

Two court cases also challenged the judgment of the network censors. In 1974, NBC aired the movie "Born Innocent" which depicted the rape of a girl with a plumber's helper in the shower area of a reform school. Four days later, a 9-year-old girl was attacked in a similar manner by four juveniles in San Francisco. The girl's mother sued NBC and its San Francisco affiliate for $11 million in damages. The broadcasters relied upon a First Amendment argument based on freedom of the press. The case was thrown out of court four years later when the judge ruled that the family would have to prove that NBC intended its viewers to imitate the behavior depicted in the program. The Standards and Practices Department at NBC did, in fact, have misgivings about "Born Innocent." At a screening for potential sponsors, fifteen national advertisers refused involvement with the movie (Liebert and Sprafkin, 1988).

The second notorious legal challenge that the networks faced was just as troubling. In 1977, a 15-year-old boy, Ronney Zamora, went on trial for killing an elderly neighbor during a robbery attempt. Zamora's defense was that he was legally insane at the time of the crime, due to an addiction to the program "Kojak," as well as other television dramas. Zamora's attorney argued that Zamora had become "subliminally intoxicated by the prolonged viewing of television programs, especially those depicting explicit violence" (Reel, 1979, p. 109). After hearing two weeks of testimony, the jury deliberated just two hours before finding Zamora guilty of the crime. He was sentenced to life in prison (Liebert and Sprafkin, 1988). The television networks had

managed to avoid being held responsible for acts which some claimed they had incited.

Until the NAB's Television Code was abandoned in 1982 in the peak of broadcasting's de-regulatory fever, the censors maintained their power through the importance of their liaison role with special interest groups (Davis, 1987). However, the FCC's institutionalized laissez faire policies have removed the burden of fear from the networks. From a business perspective, the FCC has been a good friend to the networks in the 1980s. Although NBC still receives 250 thousand viewer letters that deal with taste, propriety, and fairness each year, governmental administrative action is no longer a primary threat (Henry, 1988).

IV.

The current upheaval within the standards and practices departments is a product of the economic environment in which the networks operate. The three major networks have changed ownership since the mid-1980s. ABC merged with Capital Cities Broadcasting, a major stake in CBS was purchased by Loews, and NBC's parent company, RCA, was purchased by General Electric. A fourth network, Fox, has begun offering a limited schedule. At the same time, managers were brought in under the direction of corporate leaders who, for the most part, had no background in broadcasting. To these leaders, the $15 million that the three networks collectively spent each year on standards and practices was an unnecessary cost. And, in a time when even the news divisions

have had their budgets cut, it was inevitable that standards and practices would become a target for cost-containment (Davis, 1987).

In 1988, the axe fell. At both NBC and CBS, the standards and practices departments were abolished. While ABC has kept standards and practices as a separate department, staffing was drastically reduced (Powell, 1988). In the 1970s, each network employed 75 to 80 censors. Following the 1988 restructuring, ABC's Standards and Practices Department employed 35 to 40 censors, while NBC and CBS employed fewer than 30 censors each, working for departments other than standards and practices (Zoglin, 1988).

The result of the cost-containment has been a dramatic restructuring of not just the organization, but also of the role of standards and practices. The censors who were once responsible for all non-news program and advertising content are now left with oversight responsibility for commercials and for programs that are "in development"--not yet on the air (Liebert and Sprafkin, 1988). Once the program begins its run on a network, the controlling of objectionable content becomes the responsibility of the producer and the network programmers (Henry, 1988). This makes very real the fear of some that self-regulation is no longer a reality.

According to Henry, self-regulation is a thing of the past. "[T]he era of self-censorship at the networks is all but dead. Judgments about what is fit and ready for prime time--or any other daypart--will be made by the producers themselves, and by program

department executives whose main function is to deliver better ratings" (1988, p. 12). Although self-regulation has long been held to be unworkable from a public interest standpoint (Persky, 1977), several controversial program decisions that coincided with the standards and practices restructuring may indicate that self-regulation is better than no regulation.

The most notable (and noted) incident involved the newly-formed Fox network and the program "Married . . . With Children" (Zoglin, 1989). Early in 1989, Terry Rakolta, who was billed as a "Michigan housewife" (Lasswell, 1989, p. 33), complained to sponsors of the program about its "blue" content. As a result, several advertisers, including Kimberly-Clark and Procter & Gamble, said they would no longer run advertising on the program. Rakolta established an interest group, Americans for Responsible Television, which is surveying sponsors about their procedures in choosing which programs to sponsor (Freeman, 1989).

It is well worth noting here the cyclical nature of who directs the program content control function. Single sponsor advertisers were primarily responsible for the content of their programs until the mid- to late-1950s when the networks found it advantageous to assume those functions. Now that the networks seem to have abdicated a controlling function, the advertisers have begun to reclaim the role.

Several boycotts of advertisers were attempted in the 1970s by religious organizations, but they were generally less successful in drawing the desired reaction from sponsors (Freeman, 1989). As broadcasting has become a de-regulated industry, the

networks have become less accountable to the special interest groups. Without fear of government action, there is little motivation to be found in the short-term to satisfy a minority of upset viewers. It is not surprising then that these vocal critics have turned again to advertisers who are still dependent upon the goodwill of the consumer.

V.

If the notion of cycles between public purpose and private interest, as characterized by Schlesinger (1986), has validity, then the short-term view taken by the networks will have long-term costs. Should the private interest, de-regulatory 1980s become the public purpose, re-regulatory 1990s, the networks could find themselves dealing with stricter content controls than existed during earlier periods of self-regulation. Declining viewership of broadcast television, at least partially a result of the availability of alternative sources of television, has left the networks in a less powerful position than they once enjoyed.

Self-regulation has not generally been used for reasons of artistic concern or social responsibility. Self-regulation of content grew out of economic forces and has declined because of those same economic forces (Henry, 1988). Yet a view to the long-term economic future suggests that the decision to abandon self-regulation may not have the positive effect desired by the networks.

To effectively manage future economic costs of programming,

the networks must reassess the role of their censors. Regular contact with interest groups is vital. It can increase the number of voices that the network hears (Davis, 1987), remove pressure from nervous advertisers by providing a sounding board for viewer complaints (Lavine and Wackman, 1988), and provide those who wish to re-regulate content controls with evidence of network concern (Liebert and Sprafkin, 1988).

The awareness of the value that the standards and practices departments bring to a network must be evaluated. From a public relations perspective, the networks have, and could continue to have, benefitted from visible, active standards and practices departments. Too often corporations are unaware, or simply fail to recognize, the trends that precede issues that will affect the organization (Jones and Chase, 1979). It is important for the networks to adopt a program management perspective, which would allow them to better anticipate and respond to public purpose pressures. The traditional role of the standards and practices departments as a liaison with the audience, affiliates, advertisers, and government positions the departments to aid in corporate management. The liaison can sense public demand before it is articulated through organized interest groups. Most importantly, self-regulation can be used to nurture the relationship between the television networks and advertisers, what Turow terms the "key connection" (1984, p. 43). Ultimately, though, the decision whether to reinstitute the past self-regulatory functions of the standards and practices departments will rest on an economic justification. However, if the networks

recognize a goal of long-term financial stability, the possibility of influencing public policy, and the cyclical nature of public opinion, the evidence for re-establishing self-regulatory content controls becomes compelling.

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Coverage of Black Americans

by the New York Times, 1981-89

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Coverage of Black Americans

by the New York Times, 1981-89

The Kerner Commission report, like the Golden Rule, is one of those noble standards for behavior that has been more often honored in the breach than in the observance. Even President Johnson, who appointed the commission to investigate the causes of the 1960s urban riots, refused to allow the commission to make its report to him in person. The report's section concerning the media was largely ignored in the periodicals of media professionals at the time the report was issued, and not until 10 years later did the newspaper industry undertake serious efforts to recruit more minority journalists, as the commission had urged.

During the last decade, however, the subject of minority recruitment has been discussed ad infinitum by both media professionals and academics, although actual progress in hiring has been painfully slow.

The Kerner Commission's other main criticism of the media--that they failed to accurately reflect the lives and concerns of black Americans--has simply been ignored by most professional journalists and in academic studies until very recently. Members of minority communities are still complaining that the media continue to, in the Kerner Commission's now-familiar phrase, "write and report from the standpoint of a

white man's world."1

Yet professional journalists seem to seldom discuss the quality of their coverage of minorities, perhaps because it is hard to analyze and measure. It is much easier to count the number of minority journalists on a paper's staff and calculate how that number has grown than it is to assess the quality of a paper's coverage of minorities and whether that quality has improved. Journalism scholars also have been slow to study the quality of the media's coverage of minorities and how it has changed over time. Only a few studies of coverage--especially newspaper coverage--of black Americans have been reported since the Kerner Commission issued its report in 1968. These studies will be reviewed later; most of them reveal continuing inadequacies of coverage.

Perhaps the real importance of the Kerner Commission's report as it relates to the media is that the report sets a standard against which to measure media performance, just as the Hutchins Commission did after World War II when it set forth the social responsibility theory of the press. This standard-setting function of the Kerner report can be noted in the fact that for the past 12 years, nearly every time a media professional or journalism scholar has written an article or organized a convention discussion about media hiring or coverage of minorities, the person has opened with a reference to the Kerner Commission's criticisms. Thus even though the commission's recommendations concering the media are being implemented very slowly, they are in active use among media scholars and

professionals as a set of goals, a road map of where the media should be going.

In its section on the media the commission was referring to media coverage of black Americans, but in the past decade its criticisms have been applied to media coverage of minorities in general. For purposes of this paper, howevever, the focus will once again be on media coverage of African Americans. Also, while the commission was discussing coverage by the media in general, this project has focused only on coverage in newspapers.

The question of how accurately the media portray minority life and concerns is still of vital importance, for several reasons. First, because U.S. society remains largely segregated, it is from the media that many white Americans form their impressions of blacks and of other minorities within society.[2] Second, attempting to present less biased and more accurate coverage of minorities is, quite simply, the right thing to do.

Finally, it is from among the nation's fast-growing and diverse minority populations that newspapers must find the readers--and advertisers--they need to remain alive. If they are to win their minority readers' interest, they must improve the accuracy of their portrayal of minorities and the sensitivity of their coverage of minority concerns. As was stated in one report on the crucial role minorities play in the future of newspapers, "Minorities who feel they are unrepresented have little incentive to subscribe or advertise."[3]

During the past two decades some scholarly attention has been paid to measuring the quality of various newspapers'

coverage of black Americans, but not enough has been done to provide an overall picture of changes in press coverage across the nation since the commission issued its report. This author's 1985 study of coverage of black Americans in five newspapers before, during and after the civil rights movement found little decrease in the amount of news space devoted to black Americans between the 1960s and 1970s issues sampled, even though the highly dramatic confrontations typical of the 1960s seldom occurred in the 1970s, and even though the newspapers' abandonment of the label "Negro" or "black" in the 1970s meant that some items about African-Americans escaped the coder.[4]

A 1989 study by Pease of the Columbus (Ohio) Dispatch's coverage of minority news in 1965 and 1987 also indicated a similarity in the amount of news space devoted to minorities during the two time periods.[5] In both studies the amount of coverage related to civil rights dropped after the 1960s, while coverage of political activities and of crime increased.[6] Lieb analyzed coverage of black Americans in the Washington Post Magazine for a year and found little neutral or positive coverage of blacks before a vigorous protest by black readers over the first issue of the redesigned magazine in the fall of 1986, after which coverage of black Americans greatly increased and became much more positive.[7]

In a study of coverage of black Americans in white and black newspapers and broadcasting outlets in Boston in 1986, Johnson found that in the white media the dominant picture of the city's black neighborhoods was of crime- and drug-ridden areas, while

the black media showed these neighborhoods as also involved in efforts to improve education, business, housing and community appearance. He also found that African Americans with special authority or expertise in an area were usually overlooked by white reporters doing a story on the issue; white sources were used instead. In addition, he noted that in stories with direct links to racism, more than half the time the white media failed to acknowledge or explore the impact of the racism.[8]

In 1988 Sneed, Riffe and Van Ommeren reported on their survey of 117 black legislators, who stated that they felt the white press in their communities did not do a good job of covering the black community, failed to report many stories of interest to blacks and was unfair in its coverage of crime news involving blacks. The researchers also found that black legislators felt the press was conflict-oriented and that the legislators were denied the same quality of treatment given to white officials.[8] In her study of coverage of black elected officials in 19 metropolitan dailies between 1970 and 1977, Chaudhary found that although articles on black officials were slightly longer than those on white politicians, the stories were less favorably displayed and less positive in content.[9]

Pritchard examined two Milwaukee newspapers' coverage of homicide prosecutions in 1981 and 1982 and found that homicides allegedly committed by blacks or Hispanics tended to be covered less extensively than those in which the accused was white.[10] In a 1978 study, Tan found that blacks in a Texas community thought newspapers were not printing enough good news about blacks, were

not treating blacks fairly and were unfair in their coverage of crimes involving blacks.[11]

Williams analyzed coverage of the 1970 killings at Jackson State College in Mississippi in the local newspaper, larger Southern newspapers and the wire services. He found that the local paper excluded all viewpoints of the incident except that of the police, while the other media included black sources and views in their stories.[12]

Some common themes emerge from these studies, and they echo the findings of pre-1968 scholarly studies of press coverage of black Americans.[13] They are that the newspaper portrayal of black Americans is largely negative, that it focuses on African Americans who fulfill stereotypical images of blacks (as athletes, entertainers, criminals or failures in some way) while largely ignoring blacks who do not fit these images, that it ignores the diversity and the everyday life activities of the black community, that it ignores the forces--especially racism--that still obstruct African Americans in their efforts to attain freedom of equality and opportunity.

The study reported here was designed to measure whether and to what extent these coverage deficiencies still existed in the 1980s in the New York Times. This paper was examined in the author's earlier study of portrayal of black Americans before, during and after the Civil Rights Movement. This extension of the earlier study was undertaken to provide more empirical evidence in the important question of whether newspaper coverage of black Americans is becoming more accurate and representative.

This study also will provide a rare longitudinal picture of this newspaper's portrayals of black Americans and how these changed over the past 40 years.

The earlier study had examined a total of 66 issues of the Times from the early 1950s, between 1963 and 1968 and throughout the 1970s. Some 384 items about black Americans were coded. A coding instrument responsive to the coverage concerns raised in the paragraph above was devised for use in the earlier study and was used again, with some refinements and modifications, in this project.

Questions to be answered in this study are:

1. What percentage of the newspaper's available news space was devoted to coverage of black Americans?

2. How much of the coverage portrayed the everyday life of black citizens and of blacks as a ordinary part of American society?

3. How much of the coverage presented stereotypical images of blacks?

4. How much of the coverage explored problems facing blacks?

5. How did the paper's coverage in each of these areas in the 1980s compare to that found from the earlier time periods?

Design of the Study

The Times was selected for study because it is the kind of resource-rich, influential paper that might have been expected to take a lead in correcting some of the coverage inadequacies

pointed out in the Kerner report. Also, because of its leading position, it is the kind of paper at which the Kerner Commission was thought to be directing its exhortations to improve coverage of black Americans.

Items concerning black Americans in 30 issues of the paper were studied. The issues examined were drawn randomly from a stratified sample of months, weeks of the month and days of the week Monday through Saturday. Six issues a year from the years 1981, 1983, 1985, 1987 and 1989 were sampled.

Each issue was scanned and all pertinent items noted, measured and assigned to the appropriate coverage category on the basis of the item's topic. The sports sections of the issues were not examined, because the focus of the study was general news coverage of black Americans. All items were converted to a standard 2.25-inch column width to facilitate comparison with findings from the earlier study.

The recording unit was any newspaper item--news or feature story, editorial or opinion column, letter to the editor, photo or cartoon--that concerned American blacks or events involving or directly affecting blacks. Since the newspaper dropped the racial designation of "Negro" and "black" in most stories during the 1960s, some newspaper items about black Americans published after this period would have escaped the coder. This was not seen as a problem, however, because the intent of the study was to assess the kind of portrayal of black Americans the Times presented to its readers, and if the coder could not tell that the subject of an item was a black American, most readers would

not be able to tell either.

A total of 219 items was coded.

The instrument used for coding the coverage included 15 subcategories that were grouped into three main categories. The first of the main categories was Stereotypic Coverage. It included accounts of crimes committed by blacks and items about entertainment and sports figures found in the general news sections of the papers.

The second main category was called Everyday Life Coverage, and included items that showed blacks as part of the normal life of the community. Included here were accounts of community activities, individual achievements, political activities (including local officeholders at work), public housing or other city programs that involved black neighborhoods, the arts (including reviews of performances by blacks or accounts of films and other works that included blacks), disasters, and interracial violence that did not grow out of civil rights efforts.

Items directly related to the civil rights struggle were coded into the third main category, Civil Rights Coverage. This section included black protest, riots, white resistance to integration--both violent and non-violent--and other civil rights-related news.

Included in this category was black problems, which was comprised of items in which the author's or artist's aim was to explore a problem facing black Americans. Glimpses of black problems were seen in many other items coded into different subcategories, but this category was reserved for accounts where

discussion of a continuing inequity or new problem was clearly the author's or artist's main purpose.

Although the column inch totals in the various coverage categories can answer many of the research questions posed earlier, qualitative analysis is needed to flesh out the study's findings. To this end, notes were taken on the assertions made in editorials, the nature of the coverage and other information that seemed to provide a clue to the newspaper managements' general attitude toward coverage of African Americans.

The available news space of each paper was estimated from annual reports published in Editor & Publisher of the advertising-news ratio in each paper and on hand measurements of the news hole in issues from the 1980s.[14]

Intercoder reliability was tested by having several persons not involved in the study code various sample issues that included 39 pertinent items. The number of subcategory assignments made was divided into the number of agreed-upon assignments. Intercoder reliability in the current study was 87%; in the previous study it was 86%.

Findings

The first finding of the study concerned the volume of coverage, as compared to the paper's total available news space, or news hole, that was devoted to coverage of African Americans. In the 1980s issues sampled this proportion remained roughly where it had been in the 1970s, slightly above 2%, as Figure 1 indicates. In the 1970s the coverage had not dropped off sharply

even though the highly dramatic civil rights-related confrontations of the 1960s had largely ceased, and the current study shows that the Times' continued attention to black Americans has extended through the 1980s.

Less positive is the increase, shown in Table 1, in Stereotypical Coverage as a percentage of the paper's total coverage of African Americans. Not only did this category of coverage reach in the 1980s its highest proportion in all four time periods studied, but nearly all of the coverage in this category concerned blacks accused or convicted of crimes.

Another change in this type of coverage was the appearance, in the 1987 and 1989 issues sampled, of stories about criminal charges brought against black elected officials. These were the only issues in the total 96 issues sampled in both studies in which the crime stories found concerned prominent African Americans, except for a few issues in 1967 reporting Congress denying Adam Clayton Powell his seat in Congress on the grounds that he had misused public funds.

Although Table 1 does not make provision for illustrating this fact, fully 11% of the antisocial action coverage in the 1980s concerned the indictment of Congressman Ford for mail and bank fraud, the investigation of allegations of cocaine use by Atlanta Mayor Andrew Young, and the impeachment of Federal Judge Alcee Hastings of Florida. Several additional stories about crimes allegedly committed by black businessmen and lawyers were run in these same years, although they are not reflected in the 11% figure.

The proportion of coverage of black Americans devoted to coverage of Everyday Life rose another 10% in the 1980s issues coded, to 68% of the total. In addition, a large portion of this category of coverage in the 1980s, and fully 25% of the total coverage of black Americans in that period, was devoted to the community activities subcategory. This group included items presenting blacks as part of the normal activities of the community and about activities within the black community, such as items about black organizations, businesses and colleges and blacks as members of the work force and the general public. Presumably it was a lack of this kind of coverage to which the Kerner Commission was referring when it stated, "Far too often the press acts and talks about Negroes as if Negroes do not read the newspapers or watch television, give birth, marry, die, and go to PTA meetings."[15]

During the coding it was noted that a large number of the items in the community activities subcategory were stand-alone photos, unaccompanied by a story. A tally was kept of these photos, and it was discovered that 43% of the total community activities coverage consisted of these photos. Although comparable figures are not available from the earlier study, the coder remembers that not nearly so much of the previous community activities coverage was comprised of photos. In fact, it was the presence of such unusually large numbers of photos in this subcategory that alerted the coder to begin keeping track of them.

Although the content of most of these photos was positive or

neutral in its portrayal of blacks, the presence of a growing number of negative stand-alones was noticed in the late 1980s issues coded. It seemed that photos of welfare recipients, AIDS-infected or drug-addicted babies, prison inmates and residents of crack- and crime-ridden neighborhoods featured blacks exclusively. Two photos of each of these types were found.

Other noticeable changes in the Everyday Life category of coverage in the 1980s as compared to the 1970s were the increases in the political activities and the arts subcategories of coverage and the decline in coverage of individual achievements. The increases may simply be a reflection of the presence on the American scene of more black elected officials and the rise of black political power, and of more black entertainers and works of art that include African Americans. No explanation can be suggested for the decline in the individual achievement subcategory, which includes items about appointments, elections and other activities honoring the achievements of blacks not in the sports, entertainment or civil rights fields.

As coverage in the Everyday Life category went up in the 1980s as compared to the 1970s, coverage in the Civil Rights area went down. The biggest decrease was in the subcategory of black problems coverage, devoted to items in which the writer's purpose was clearly an exploration of some problem facing black Americans. Some mention of these problems could be found in news stories, but only four stories, three of them very short, were devoted to exploring situations and forces obstructing the black

struggle for equality. The only substantive problem story was a long feature on "a new form of slavery in the South"--exploitation of black workers at poultry farms.

This inattention to black problems seems odd, because glimpses of severe problems facing African Americans could be found in numerous news stories in the issues coded, and a 1981 Times editorial and another in 1985 warned that equality of opportunity and before the law were a long way from being realized in the U.S. Yet aside from these two items, a short piece explaining that black men were much more likely than white men to be sentenced to prison, and the poultry farms article, the paper devoted very little space, in the issues studied, to explaining to their readers some of the problems facing blacks or to exploring the problems' ramifications and possible solutions.

The 1981 editorial, which criticized the Reagan administration's retreat from commitment to civil rights and affirmative action, sounded a theme that was echoed in many stories found in succeeding issues. It is not enough simply to proclaim equality of opportunity, the editorial said, when "every index of misery" shows that the devastating effects of racism linger in America. "This is not the time for wholly neutral government," the editorial stated; the government should do more to insure equality of opportunity.

Manifestations of the government's retreat from civil righs and its effects could be glimpsed in stories reporting that the House of Representatives voted overwhelmingly against pursuing busing to achieve racial integration (1981), Cabinet Member Edwin

Meese said he saw no "authoritative evidence" of hungry children in America and stated the government was spending too much on food assistance (1983), the FCC ruled that broadcasts of racial hatred were not grounds for refusing to renew a station's license (1985), the U.S. Civil Rights Commission harshly criticized the Supreme Court for upholding job preferences for women and minorities (1987), and the Supreme Court refused to hear an Alabama case seeking to prevent defense lawyers from removing all blacks from a jury panel (1989).

Other glimpses of problems facing blacks, besides the federal government's backpedaling on civil rights, were found. For instance, in 1981 the Ohio city of Parma successfully blocked a housing desegregation plan. Also in 1981 "60 Minutes" reported a national increase in attacks on racial and religious minorities. In 1981, twenty-seven years after the Supreme Court school desegregation decision, South Carolina and the federal government finally agreed on a plan to desegregate the state's colleges and universities. In 1989 two Atlanta suburbs prevented minicipal trains from entering their area because of residents' fears the trains would bring blacks into the suburbs.

One very untypical example of <u>good</u> news concerning race relations was found in a 1987 feature about blacks and Hassidic Jews who were jointly patrolling Brooklyn's Crown Heights section. The area had been torn by tension between the two groups for more than 10 years, according to the article, and in the past Hassidic patrols had been accused of harrassing blacks. This story was noted because in all the issues coded in both

studies, stories about cooperation between races and improvements in race relations were found only twice. Stories about problems and conflict between races were the norm.

Discussion and Conclusions

The Times' continued attention to coverage of African Americans in the 1980s, as a percentage of its total available news hole, is seen as a positive sign. It seems to indicate that the paper's extended increase in coverage of blacks in the 1970s was not just a temporary situation triggered by the newsworthiness of the civil rights confrontations, but a permanent shift in the papers' level of awareness of African Americans.

Less encouraging is the paper's increase, in the 1980s issues sampled, in Stereotypical Coverage, especially in the area of black criminal activity. Also alarming is the growing proportion of coverage of black elected officials accused of crimes. Of course white elected officials are accused of criminal behavior too, and in some cases the charges against black politicians have proven accurate. But the sudden increase in these kinds of accusations against blacks in the past several years does lend some versimilitude to various black leaders' recent charges that law enforcement officials are conspiring to discredit black elected leaders with trumped-up accusations. The danger is that the growing frequency of the charges may influence journalists to assume that because some new accusation against a black official fits a pattern, it probably is true, and to cover

the story with that assumption. As with stories about nonprominent blacks accused of crimes, the question is not whether or not the story should be reported, but how much prominence and space and continued attention it should be given.

The Times' increased coverage of Everyday Life, especially community activities, in the 1980s issues coded is considered positive. This increase shows progress toward a goal urged by the Kerner Commission and many African Americans both before and since the civil rights era. That goal is to cover the same kinds of news about black Americans as about white Americans, and to show individual blacks and various black communities--the black middle class, the affluent, the inner city residents--in all their diverse activities and faces.

The paper's shift toward using stand-alone photos as a large proportion of its coverage of black everyday life can be seen as both positive and negative. In one sense, if a picture truly is worth 1,000 words, perhaps a photo of a black policeman helping rescue a family trapped in a wrecked car or black women among pickets at a factory can go a long way toward erasing some whites' perceptions of blacks as somehow apart from ordinary American life. On the other hand, while such pictures convey a message, they don't impart much substantive information about black community life and activities.

Definitely negative was the growing number of photos that, by showing only blacks in photos of welfare recipients, prison inmates, ghetto dwellers and drug- and AIDS-infected babies, seem to imply these situations are restricted to black Americans.

Just as the Times and many other American newspapers seem to have made a concerted effort, in the past two decades, to include blacks and other minorities in crowd shots and other everyday life photos, it seems they need to be sure to include whites in their photos of persons suffering from American society's ills.

Also disturbing was the Times' very limited attention to the situations and forces still obstructing equality for African Americans. By the coverage in its own stories and editorials the Times noted that many inequities and injustices still exist, but the paper seemed to abandon the attempt to explain these situations to their readers. The paper often reminded readers of the problems' existence, but failed to explore them. Yet some explanation of problems and discussion of their possible solutions seems a necessary prerequisite to any informed public consensus for change.

Thus this project has come up with mixed reults, with some positive changes in coverage of black Americans, like increased attention to coverage of blacks and to African Americans as a normal part of everyday life, set against rising coverage of accusations of crimes committed by blacks and decreased explanation of black problems. In addition, a possible new stereotype, of the crooked or cocaine-using black political leader, may be emerging. Also developing may be a tendency to imply through photos that society's most degrading situations are occupied exclusively by African Americans.

Similar studies of other major newspapers could reveal whether the patterns of coverage change revealed in this study

are common among leading metropolitan newspapers. In addition, studies of coverage of African Americans by middle-sized metro dailies are needed to ascertain any whether coverage patterns shared by the leading papers are found in the smaller papers also. Such continued study of the nature of American newspapers' coverage of black Americans is vital to ascertaining whether the papers are moving in the direction of providing the unbiased and accurate kind of coverage the Kerner Commission urged. It also is needed to enable journalism faculty to present to their students a clear view of the way mainstream newspapers have portrayed black Americans in the past and how that portrayal is changing.

Such continued study of the nature of American newspapers' coverage of black Americans is vital to determine whether the papers are moving in the direction of providing the unbiased and accurate kind of coverage the Kerner Commission urged and journalism professionals and scholars hold up as a coverage standard.

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